

***United States Court of Appeals
for the Second Circuit***



APPENDIX

ORIGINAL

76-1194

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United States Court of Appeals
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

PHILIP ROSTELLI, *et al.*,

Defendants,

JOHN JOSEPH SUTTER, Esq.,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

APPENDIX



SUTTER, MOFFATT, YANNELLI
& ZEVIN, P.C.

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John Joseph Sutter*

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PAGINATION AS IN ORIGINAL COPY

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75 CR 160

DATE:

EXTENSION

ABSTRACT OF COSTS

DATE	PROCEEDINGS
3/5/75	Before PLATT, J.- Indictment filed and ordered sealed by the Court Bench warrants ordered
3/6/75	Bench warrant issued
3/6/75	Before PLATT, J.- Case called- Defts produced on Court on bench warrant- Indictment ordered unsealed- Each deft arraigned and enter pleas of not guilty- bail set at \$50,000.00 P.R. Bond for deft Louis Rastelli, Bail set at \$50,000.00 surety bond for Philip Rastelli
3/6/75	Bench warrants ret'd and filed- executed (LOUIS and PHILIP RASTELLI)
3/11/75	Magistrates Proceedings received from District of New Jersey and filed Appearance bond placed in vault (PETROLE)
3/14/75	Before PLATT, J.- Case called- Defts and counsel present- Deft Petrolo and counsel present- deft arraigned and enters a plea of not guilty-Bail set at \$25,000.00 P.R. Bond secured - Limits extended to include N.J.

Docket Entries.

75CR 160

DATE	PROCEEDINGS	CLERK'S FEES	
		PLAINTIFF	DEFENDANT
	Deft DeStefano's arraignment adjd without date- Case adjd to 4/18/75 for pre trial conference- bail limits extended to include S.D.N.Y. for deft Philip Rastelli		
3-18-75	Notice of Readiness for Trial filed.		
3-21-75	Before PLATT, J - case called - deft P. Rastelli & counsel John J. Sutter present - case adjd to 4-4-75 at 2:00 PM. Certificate of Engagement issued to John Joseph Sutter, Esq		
4/4/75	Before PLATT, J.- Case called- Adjd to 4/18/75 at 2:00 P.M.		
4-18-75	Before PLATT, J - case called - defts & counsels present - adjd to May 9, 1975 for status report.		
5-9-75	Before PLATT, J - case called - defts & counsels present - deft DE STEFANO arraigned and after being advised of his rights and on his own behalf enters a plea of not guilty - bail set at \$25,000 P.R.B. secured. Adjd to 9-5-75 to set a date for trial - bail contd as to each deft - adjd to May 23, 1975 at 2:00 PM.		
5/23/75	Before PLATT, J.- Case called Deft and counsel present- Hearing ordered and begun- Hearing held and concluded		
9-5-75	Before PLATT, J - case called - deft PHILIP RASTELLI & attys present - adjd to Nov. 7, 1975 for status report)		
11/7/75	Before PLATT, J.- Case called- defts and counsel present- case adjd to 11/1 at 9:30 A.M.		
11-10-75	Before Platt, J - adjd to Nov. 14, 1975		
11-10-75	Petition for Writ of Habeas Corpus Ad Prosequendum filed (Rastelli)		
11-10-75	Writ Issued		
11-14-75	Before PLATT, J - case called - deft & counsel Mr. Wilson present - adjd to Jan. 5, 1976 for trial. (PHILIP RASTELLI)		
11/18/75	Writ retd and filed- executed (P. RASTELLI)		
12-8-75	Letter filed dated Dec. 2, 1975 from Gustave Newman, Counsel for Corp deft. Rastelli, waiving rights to a speedy trial, etc. (WORKMEN'S MOBILE LUNCH ASSN., Corp. defendant. (received from Chambers)		
12/24/75	Notice of motion for severance filed (LOUIS RASTELLI)		
12/29/75	Notice of motion for hearing to determine physical capacity to stand trial filed ret. 1/5/76 (PHILIP RASTELLI)		
1/2/76	By PLATT, J.- Order filed that U.S. Marshal deliver deft Philip Rastelli for purpose of physical examination, etc.		
1/5/76	Before PLATT, J.- Case called- deft and counsel present- case adjd to 3/29/ at 9:30 A.M. (PHILIP RASTELLI)		

Docket Entries.

75 CR--160
CRIMINAL DOCKET

DATE	PROCEEDINGS
1-5-76	Order returned and filed - executed (deft Rastelli)
3-19-76	Before Platt, J - case called - deft & counsel present - adjd to 4-29-76 for trial.
3-24-76	Stenographers transcript dated 3-19-76 filed.
3/25/76	Before PLATT, J.- Case called- defts and counsel present- Deft Philip Rastelli's motion for extention of time for trial- motion denied submi order
3/19/76	By PLATT, J.- Order filed that deft P. Rastelli be examined
3/25/76	Certified copy of order for physical exam for deft Philip Rastelli ret'd and filed- executed
3-29-76	Before PLATT, J - case called - defts & attys present - ^{for} trial ordered and begun - court fines J. I. Sutter, attorney for deft Philip Rastelli \$1000 a day for failure to appear - such fine to run daily contingent upon his appearance in court - all other attorneys are deemed engaged on trial - deft Louis Rastelli motion for severance - granted on consent - contd contd to 3-30-76 at 9:30am
3-30-76	Stenographer's transcripts dtd March 24 & 29, 1976 filed.
3-30-76	Before PLATT, J - case called for trial - defts & attys present - Atty J.J. Sutter motion to set aside imposition of \$1,000 fine to be imposed daily for Atty Sutter failure to appear for trial - motion denied but fine is modified to the extent that Atty Sutter is fined \$500 a day from 3-29-76, 3-30-76, 3-31-76 making a total of \$1500 in fines. Atty Sutter is relieved as Atty as of 4-1-76 when substitution of counsel will be effected for deft Philip Rastelli. Deft Corp. Workmen's Mobile Lunch Assoc. motion to sever - granted on consent. adjd to 4-1-76 for trial.
3-30-76	By PLATT, J - Memorandum and order filed imposing on Mr. Sutter,
3-30-76	By PLATT, J - Memorandum and order filed imposing on Mr. Sutter, Counsel for deft Philip Rastelli, costs of \$500 a day for each day of delay, i.e., Monday, Tuesday and Wednesday, March 29-31* or a total of \$1500 payable to this Court.
4-1-76	Before PLATT, J - case called - defts & attys present - adjd to 4-5-76 for trial
4-5-76	Before PLATT, J - case called - defts & attys present - trial ordered & BEGUN - Jurors selected and sworn - Trial contd to 4-6-76.
4-6-76	Before PLATT, J - case called - trial resumed - trial contd to 4-7-76

Docket Entries.

DATE	PROCEEDINGS
4-7-76	Before PLATT, J - case called - trial resumed - Trial contd to 4-8-76
4-8-76	Notice of Appeal filed. (atty. Sutter)
4-8-76	Docket entries and duplicate of Notice of Appeal mailed to the Court of Appeals.
4-8-76	Before PLATT, J - case called - trial resumed - trial contd to 4-12-76.
4-12-76	Before PLATT, J - case called - trial resumed - deft De Stefano motion for a mistrial - motion denied - Trial contd to 4-13-76.
4-13-76	Before PLATT, J - case called - trial resumed - ^{Philip} deft/RASTELLI's motion to dismiss - decision reserved - Deft De Stefano motion to dismiss and for a judgment of acquittal - denied - reserved cts. 5-7; deft Petrolo motion to dismiss - trial contd to 4-14-76.
4/14/76	Before PLATT, J - Case called- defts and counsel present- trial resumed defts motions previously made denied- deft Philip Rastelli rests- trial contd to 4/15/76
4-15-76	Before PLATT, J - case called - trial resumed - trial contd to 4-19-76
4-19-76	Before PLATT, J - case called - trial resumed - trial contd to 4-20-76
4-20-76	Before PLATT, J - case called - trial resumed - Govts motion to dismiss count 3 granted on consent. each deft renews all motions previously made - motions denied - Trial contd to 4-21-76.
4/21/76	Before PLATT, J.- Case called- defts and counsel present- trial resumed jury retires to deliberate- order of sustenance signed- trial contd to 4/22/76
4/21/76	By PLATT, J.- Orders(4) of sustenance and order of lodging filed
4/22/76	Before PLATT, J.- Case called- defts and counsel present- jury resumes deliberations- order of sustenance signed - trial contd to 4/23/76
4/22/76	By PLATT, J.- Orders of sustenance(4) and Lodging(1) filed
4-23-76	Before PLATT, J - case called - trial resumed - Jury resumes deliberation: Jury returns with a verdict of guilty on counts 1, 2, 5 & 7 as to defts P. RASTELLI & PETROLE; not guilty on count 4 as to deft RASTELLI; guilty as to counts 1, 2, 4, 5 & 7 as to deft DE STEFANO. sentences adjd without date - all motions adjd to date of sentence. bail contd for defts PETROLE & DE STEFANO - deft RASTELLI in custody - jury discharged - trial concluded.
4-23-76	10 Volumes of stenographers transcripts filed.
4/26/76	Stenographers Transcript of 4/23/76 filed

CRIMINAL DOCKET

DATE	PROCEEDINGS
4-29-76	Record on Appeal certified and mailed to the C of A
4/30/76	Stenographers Transcript dated 3/30/76 filed
5-3-76	Order received from the Court of Appeals filed that the record be docketed on or before May 28, 1976
5-5-76	Acknowledgment received from the Court of Appeals for receipt of record on appeal.
5-7-76	Copy of Opinion and Order filed received from the Court of Appeals denying petition for mandamus.
5-18-76	Before PLATT, J - case called - bail application substitution of security - no opposition - motion granted - deed accepted(Petrole)

Certificate of Engagement.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

vs

PHILIP RASTELLI

DEFENDANT

DOCKET NO. 75CR160

CERTIFICATE OF ENGAGEMENT

THE UNDERSIGNED HEREBY CERTIFIES THAT

JOHN JOSEPH SUTTER
33 WILLIS AVE.
MINNEOLA, N.Y. 11501

is required to appear in this Court in the above mentioned matter
on the 29TH Day of MARCH 1976 at A.M.
in Courtroom #7, 4th Floor at 225 CADMAN PLAZA EAST, Brooklyn, N.Y.
11201.

DATED: Bklyn, New York

~~SECRET~~

JANUARY 5 1976

Thom C. Platt

UNITED STATES DISTRICT JUDGE

Minutes of Hearing, March 19, 1976.

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

-----x

UNITED STATES OF AMERICA :

-against- : 75-CR-160

PHILLIP RASTELLI, :

Defendant. :

-----x

United States Courthouse
Brooklyn, New York

2:00 o'clock P.M.
March 19, 1976

B e f o r e :

HONORABLE THOMAS C. PLATT, U.S.D.J.

GERALD SEATTIE
ACTING OFFICIAL COURT REPORTER

Appearances:

DAVID G. TRAGER, ESQ.
United States Attorney
for the Eastern District of New York

BY: CARL BRONSTEIN, ESQ.,

-and-

CHARLES WEINTRAUB, ESQ.
Assistant U.S. Attorneys

STEPHEN L. WILLSON, ESQ.
Attorney for Defendant

Also Present:

MICHAEL ROSEN, ESQ.,

-and-

GUSTAV NEWMAN, ESQ.
for Louis Pastelli

Hearing, March 19, 1976.

THE COURT: I called this case this afternoon

because I got together with Judge Weinstein. I tracked
him down in Albuquerque. Judge Weinstein --

MR. BRONSTEIN: Mr. Essaroff.

THE COURT: Mr. Essaroff knew we had this
engagement on March 29th. He should have informed
him. However, we can work it out so that Mr. Essaroff
can start before Judge Weinstein on Wednesday.

Mr. Essaroff will be released to pick a jury on
March 29th, before this Court in this case and it is
not going to be any impediment for this case to
proceed. So, that takes care of that question.

MR. BRONSTEIN: There are two other matters
that came to the Court's attention since we called
for a pre-trial conference. First of all, we under-
stand there is a plan by Mr. Phillip Rastelli to
change counsel. Second of all, the other remaining
matter will be the physical condition of Louis Rastelli.

THE COURT: Who is for Phillip Rastelli?

MR. WILLSON: My name is Stephen Willson.

THE COURT: Mr. Willson?

MR. WILLSON: That is correct. Our office,
and Mr. Sutter, who is currently engaged in a murder
trial before Judge Zamenga in County Court, Nassau
County, has not given this case the attention it

Hearing March 19, 1976.

1 deserves. I feel, perhaps, I am primarily to blame
2 for not bringing to this Mr. Sutter's attention. None-
3 theless, the preparations have been spotty, to say
4 the least. I do not blame Mr. Rastelli for desiring
5 to change counsel, and I hope this Court is not
6 prepared to penalize him for what I feel is my office's
7 neglect.

8 THE COURT: I will not penalize him. If he
9 wishes to change counsel, he can. The case is going
10 on the 29th regardless if he changes counsel.

11 MR. WILLSON: Further, your Honor, I would
12 like you to consider the medical situation.

13 THE COURT: One step at a time. Do you under-
14 stand what I am saying on this particular point?
15 He can take anybody he wishes as new counsel, provided
16 appropriate substitutions are executed, but he does
17 so with the express understanding that we are going to
18 trial on March 29th. This engagement was set several
19 months ago, and I just indicated to Essaroff's attorney,
20 it has inconvenienced every other judge in this
21 court, this case. I have been asked by the Chief Judge
22 to take another case that is under a 90-day gun, and
23 the Chief Judge, and every other Judge is recognizing
24 my engagement with this case on March the 29th. The
25 Strike Force has kept Mr. Weintraub on their payroll

Hearing March 19, 1976.

1 for this case. It is not going to be adjourned.

2 Mr. Sutter can fulfill his obligation to his client.

3 If he can't do it, somebody else can come in and try

4 it. If it is not done properly, he is accountable to

5 his client. He has known about this trial date. It

6 is not going to be adjourned.

7 MR. ROSEN: We have been contacted by

8 Mr. Rastelli several days ago to come in and represent

9 him in this case.

10 THE COURT: I told you the condition.

11 MR. ROSEN: I know what was said. I think

12 counsel's candor in Mr. Sutter's office compels your

13 Honor to reconsider.

14 THE COURT: There is going to be no reconsidera-
15 tion.

16 MR. ROSEN: If in fact your Honor does allow

17 our firm to represent --

18 THE COURT: Mr. Justice Clark of the United
19 States Supreme Court, when I saw him a year and a half
20 ago in Washington, when I was sent down there after I
21 had been appointed to the bench, said to me, at that
22 time, "Judge Platt, one of those things you are going
23 to find when you get to Brooklyn is that every time you
24 set a case for trial and give the attorneys a firm date,
25 one week before the trial date you are going to get

Hearing March 19, 1976.

1 at least one application from another attorney who is
2 going to walk in and say I want to have a substitution
3 and we want an adjournment as a result thereof."
4 He said, there's only one way to deal with that problem.
5 That is to say, you may have that substitution, but
6 you're going to trial. I have found that to be the
7 truth, unfortunately enough. I don't know why it is
8 peculiar to this Court, but attorneys in this metropoli-
9 tan area must realize that this is the ruling. It is
10 a ruling that is uniform throughout both the Southern
11 and Eastern Districts, and it is not going to be varied
12 in this case.

13 MR. ROSEN: I appreciate your Honor's position.
14 I would suggest to your Honor that in fact I have no
15 doubt Mr. Sutter's office has --

16 THE COURT: If they want to confess wrong,
17 that is their problem, but it is not my problem. It
18 is not your problem. You don't have to take the case.
19 They have to try the case. They took the case. They
20 are responsible for it. You do not have to get
21 yourself into this situation.

22 MR. ROSEN: I'm aware of that. Your Honor,
23 I am trying to speak from the standpoint of Mr. Rastelli's
24 rights.

25 THE COURT: There is no suffering of his

Hearing March 19, 1976.

1 personal rights. This case was adjourned to the
2 March 29th date at everybody's request. This was the
3 date they picked. I didn't pick it.

4 MR. ROSEN: I am aware of that, Judge, but I
5 don't believe your Honor would even permit for one
6 second a man to go to trial whose counsel is not
7 prepared.

8 THE COURT: He's got his problems with his
9 counsel. He picked the counsel. This is not a court-
10 assigned counsel. This is a counsel he picked.

11 MR. ROSEN: I am aware of that, too. I think,
12 most respectfully, the man's liberty is at stake, and
13 if this attorney represents to us that he has failed
14 in his obligation, he should not be penalized.

15 THE COURT: They had better get to it between
16 now and the 29th.

17 MR. WILLSON: Your Honor, in view of the request,
18 I don't understand the importance of this particular
19 case, which is one count of the Sherman Anti-Trust
20 Act, and several counts of the Hobbs Act, must commence
21 on March 29th. If Mr. Rastelli does wish a change of
22 counsel, and we have, as I stated, not adequately
23 prepared for, if he wishes new counsel to come and --

24 THE COURT: I understand the importance of the
25 case.

Hearing March 19, 1976.

MR. WILLSON: I am asking most respectfully --

Judge, I don't know why it is so important that it must commence on March 29th to Mr. Rastelli's prejudice.

THE COURT: It is not to Mr. Rastelli's prejudice. This not a new case. This bears a 75 CR 160. This has been on the calendar for one solid year. Under the new rules enacted by Congress it should have been tried six months ago.

MR. WILLSON: In that regard, Judge, I would like to make it clear why Mr. Rastelli is currently incarcerated and is not on the bail that has been set and posted in this court. He's in jail on the testimony of one man, a former bail bondsman, admitted forger of the County Court judge's signature. That man's case is over four years old. In fact, it was on this morning in Riverhead. That man's trial is the reason for Mr. Rastelli's incarceration now, and while we can't get his own doctor to perform his operation. That man's indictment is over four years old. There have been over 50 adjournments. It has been adjourned to this morning. It appeared nowhere on the calendar except that the administrative judge's clerk told me that the folder was in the back and would be sent out back somewhere.

THE COURT: This is not Suffolk County.

1 MR. WILLSON: I am aware, Judge. I am trying
2 to give the background for the problem we are facing
3 here, and why this man can't get the surgery he needs,
4 and why I feel somehow that there is some magic to
5 the name that everybody that everybody wants to go
6 after Mr. Rastelli. Maybe I'm a bit paranoid, but I
7 know this particular man, and his testimony was
8 allowed to convict him, and is the reason that he is
9 in prison. He is represented by a prestigious law firm
10 in Suffolk County. He was under a perjury and forgery
11 indictment. No motions were ever made, and yet, this
12 witness at the trial swore up and down, he said he
13 made no deal for his testimony either with Mr. Nadjari --

14 THE COURT: What have I to do with that?

15 MR. WILLSON: This man is in jail on a writ
16 brought this Court on the Washington case basis.
17 Judgement came down to the Second Circuit.

18 THE COURT: We're not here to consider that.

19 MR. WILLSON: I think we ultimately will be when
20 we see why he has not been able to get his surgery,
21 and were it not for this particular thing, I think they
22 are looking for a big name, scalp, to put on their belt
23 in Suffolk County, and perhaps this is the situation
24 here.

25 THE COURT: This is not the situation here. This

Hearing March 19, 1976.

1 case is one of the oldest criminal cases I have got.

2 It's not the oldest criminal case I have. It is going
3 to be tried on March 29th.

4 MR. WILLSON: This is the feeling I get.

5 THE COURT: Do you want to look at my calendar?
6 Look at the rest of my calendar. Walk into my chambers,
7 ask the law clerk to look at my calendar. If this
8 isn't one of the oldest cases I have, I will reconsider.
9 I am sure it is.

10 MR. WILLSON: I would request --

11 THE COURT: You are not singled out.

12 MR. WILLSON: I would respectfully request,
13 absent an extreme prejudice to the Government, that
14 your Honor reconsider and allow new counsel.

15 THE COURT: I understand the Government has been
16 preparing for this case for some period of time. I am
17 informed that, and I may be incorrectly informed, that
18 the Government has kept Mr. Weintraub on the payroll
19 for the purposes of trying this case. Otherwise,
20 Mr. Weintraub has left the office. He is assigned to
21 try this case. This Court has to try this case. We
22 are not going to make exceptions for the reasons I
23 have indicated to you.

24 MR. ROSEN: If your honor please, we would need
25 a reasonable time, of 30 days.

1 THE COURT: You can work as co-counsel if you
2 wish. You may not impose upon the Court in this
3 fashion.

4 MR. ROSEN: Perhaps the Court has overlooked
5 the fact that Mr. Rastelli's situation --

6 THE COURT: The Government will take six weeks
7 to try. If you can't get your thoughts together in
8 six weeks to present any defense, I really don't feel
9 too sorry for you.

10 Is that right, Mr. Weintraub, it would take
11 six weeks to try?

12 MR. WEINTRAUB: That's correct, your Honor.

13 MR. ROSEN: Your Honor didn't let me finish.
14 Mr. Rastelli has been incarcerated, as I understand it,
15 on a State case. I physically saw, and I wish your
16 Honor would perhaps have the stomach to see what I
17 saw is in this man's stomach. This man has been in
18 jail. Perhaps that's why his lawyers cannot prepare
19 its case, and this is not some kind of late-minute
20 merry-go-round to delay a trial. This is well founded
21 and based on the circumstances, with no intention
22 of a delay, per se. This man has a growth coming out
23 of his stomach that is unreal. I don't blame him if
24 he can't communicate too good. He is unintelligible.
25 I have a doctor's report that states it is coming out

Hearing March 19, 1976.
1 of the man's stomach. There are substances here, most
2 respectfully, that would warrant my application.

3 THE COURT: No summations at this time.

4 MR. BRONSTEIN: Mr. Rosen is addressing himself
5 to a probable reason for judgement based upon medical
6 history. I believe we ought to reserve for the moment.
7 I assumed we were still addressing ourselves to the
8 change of counsel before we get into the medical.

9 I would like to be heard on that.

10 MR. WILLSON: I would request that your Honor
11 reconsider.

12 THE COURT: I am not going to make any changes.
13 Every other case in this court at the moment has been
14 inconvenienced as far as I understand by this case.
15 It is going ahead. I have relayed to all of the judges
16 that this was a date requested by the defendants, and
17 it was a date firmly fixed several months ago, and I
18 have moved my calendar around, and moved all sorts of
19 other litigants around. If you don't believe that is
20 so, you can ask any of the other people that have
21 appeared in the last few weeks. All have been told
22 that the time for March 29th has been reserved for
23 this case because of this gentleman. This is the date
24 you picked. I am not going to set the world aside for
25 Mr. Rastelli or anybody else. That ends that.

Hearing March 19, 1976.

Now, let's get down the medical part of the problem.

MR. WILLSON: If your Honor please, shortly after the last time we were here, and prior to that, Mr. Peace's office has been seeking to get a leave of absence pursuant to the New York State Corrections law for Mr. Rastelli to have the operation performed by his own physician. I think, perhaps, the facilities are available at Clinton. I don't question that. I do know, however, from speaking to Dr. Smith, his physician, that Dr. Smith had received, shall we say, a hostile reaction from the practicing surgeons up in the Clinton area for his coming up and performing the surgery there. He hoped to be here today.

MR. ROSEN: The doctor is here.

MR. WILLSON: I understand Dr. Smith is here. I don't want to get into a full-fledged hearing at this point. I am sure Dr. Smith can correct me if I'm wrong, the end results of Mr. Peace's offices was well in excess of a month, and what I find to be a somewhat incredible letter from the then superintendent, and I understand that he is no longer in that position at the Clinton Correctional Facility, that (A) The facilities were there, and he didn't think he was entitled to a leave of absence, and (B) In any event,

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1 the responsibility for his health was in the hands
2 of those who physically had custody of him.

3 Once again, I don't believe that is really
4 correct under the New York State correctional law.
5 I believe Mr. Rastelli is denied his right as defined
6 in that particular sentence.

7 THE COURT: Well, as you know, you brought up
8 a writ of habeus corpus before me, and as I indicated,
9 unless you can cite some authority to the contrary,
10 I didn't think I had jurisdiction. I do not see why
11 you are rearguing that point.

12 MR. WILLSON: The Warden says he doesn't have
13 jurisdiction.

14 THE COURT: The Warden does have jurisdiction,
15 and I don't see how I could have jurisdiction.

16 MR. WILLSON: I brought it -- the statute says
17 either the district where he is held, or the district
18 where the Court is in which he was convicted, which
19 is in this district. I brought it here because I knew --

20 THE COURT: You might bring it in the State
21 Court in which he was convicted. He wasn't convicted
22 in this Court.

23 MR. WILLSON: The Suffolk County Court is in
24 this district.

25 THE COURT: He is not being held in federal

Hearing March 19, 1976.

1 custody. He is being held in State custody. You can
2 go to the federal custody -- the state Court, rather,
3 and seek to get a release to his private doctor. You
4 can't come here. This is not the Court of Appeals,
5 the Court of Appeals as some of the attorneys think.

6 MR. WILLSON: And Article 78 --

7 THE COURT: Or some sort of writ of habeus corpus
8 in Suffolk County. I don't practice any longer in
9 State Court. I can't educate you.

10 MR. WILLSON: Judge -- all right.

11 MR. BRONSTEIN: Is what is being set now an
12 application for adjournment based on Mr. Rastelli's
13 physical condition?

14 THE COURT: No. That is not it. He thinks --
15 I ought to release him to the custody of his physician
16 for the purpose of an operation. I say, I have no
17 jurisdiction to do that.

18 MR. WILLSON: It will be an application, but --
19 you are right, Judge. I am initially asking you to
20 reconsider and exercise jurisdiction. I think you
21 do have it. I think it is clear, given the decision
22 of the superintendent.

23 THE COURT: Have you read the decision of the
24 Supreme Court which said that in a State Court you must
25 exercise or attempt to issue a writ of habeus corpus,

Hearing March 19, 1976.
1 fully exhaust your state for a remedy --

2 MR. WILLSON: I have not read that case.

3 THE COURT: I think Mr. Burns can recite the
4 name off the top of his head.

5 MR. WILLSON: My private library is limited.
6 I have not gone into that.

7 I am changing it to a request for an attorney
8 because of this physical condition and hope we can
9 get his own physician to do it.

10 MR. ERONSTEIN: May I be heard on that, your
11 Honor?

12 THE COURT: Yes.

13 MR. BRONSTEIN: When the matter was last on
14 the calendar in January of this year, the Government
15 represented that we would maintain Mr. Rastelli in
16 the Metropolitan Correction Center for the convenience
17 of defense counsel, and upon his request we issued
18 this writ so he could be released to the State custody.
19 In that, Mr. Rastelli had been at the MCC pursuant to
20 that understanding, and in several conversations with
21 Mr. Willson since that time, I told him, upon his
22 request, we would release him. We were told several
23 times that they preferred to be kept in the federal
24 jurisdiction for, I assume, for his physical convenience
25 or Mr. Rastelli's convenience. The situation as I

Hearing March 19, 1976.

understand it is that Mr. Rastelli is not only seeking

January until today -- he was supposed to have gotten the surgery taken care of. We find ourselves in a Catch-22 situation in this respect, the State has stood ready, willing and able to perform surgery on Mr. Rastelli. I was advised by Mr. Rodney Moody who is head of Corrections at the Clinton Correctional Facility, specifically, on November 17, 1975, Mr. Rastelli applied for elective surgery which was approved by the State at that time, and since that time they have been prepared to perform the surgery by a private physician in a hospital in the Plattsburg area. I assume with some sort of arrangement.

(Continued on next page.)

Hearing March 19, 1976.

MR. BRONSTEIN: (Continuing) Mr. Rastelli,

1 however, has apparently sought to have the surgery
2 performed by a particular private physician. To that
3 end, I was further advised by Mr. Moody that absent
4 any formal applications, there may be guidelines to
5 determine whether or not a prisoner can be released
6 for medical treatment if there is available comparable
7 treatment by the State. So, that is the status as
8 far as we have seen it, or as far as we have been
9 advised by all parties. It would seem that the
10 application for adjournment at this time would mean
11 that it would still await, not the surgery, but approval
12 of an application by the State to have it performed by
13 Dr. Smith who is Mr. Rastelli's preference.
14

15 Now, beyond that I submitted to the Court and
16 counsel today that the report of Dr. Weintraub, who
17 examined Mr. Rastelli --

18 THE COURT: Dr. Weingarten.

19 MR. BRONSTEIN: I'm sorry. My apologies,
20 Weingarten. I think the summary of that report, and
21 I am not looking for a hearing at this point, was that
22 the surgery was elected. We have scheduled, anticipating
23 that there may be a hearing, or that the defense counsel
24 may contest his capacity to stand trial, we have
25 scheduled another examination for Mr. Rastelli on this

Hearing March 19, 1976.

1 coming Tuesday, the 23rd. At this point, based on
2 Dr. Weingarten's report of January, our understanding
3 is that the surgery is elective; he is physically
4 capable of standing trial. We do not believe the
5 Government is in any way responsible for Mr. Rastelli
6 not having obtained surgery. He certainly had
7 adequate time to do so during the interim, though maybe
8 not by Dr. Smith, and we oppose any adjournment on
9 that basis.

10 THE COURT: I will not grant it on that basis.
11 At this point, I would be, of course, interested to
12 see what the examination shows on Tuesday, and if it
13 has any questions on it, I will consider it again.
14 At this point, I will not --

15 MR. BRONSTEIN: May I ask the Court's permission
16 to have Mr. Rastelli at Dr. Weingarten's office?

17 MR. WILLSON: I have no objection, if your
18 Honor would consider it also and allow Dr. Smith to
19 be given permission to examine Mr. Rastelli at the
20 Metropolitan Correctional Center, or any appropriate
21 facility they may have.

22 MR. BRONSTEIN: The Government will not object
23 to the application by defense, provided they draw the
24 appropriate papers to produce a physician.

25 THE COURT: Can he examine him at the MCC?

Hearing March 19, 1976.

1 MR. BRONSTEIN: Judge, I do not know what the
2 prison regulations would be. I don't know if it can
3 be done.

4 MR. WILLSON: If it can be done.

5 THE COURT: Let me ask this, if he is going
6 to be produced for examination at your doctor's office,
7 Dr. Michael Weingarten, at 9 o'clock on March 23rd,
8 would there be any objection to Dr. Smith examining
9 at 10 o'clock?

10 MR. ROSEN: That is what I was going to apply
11 for, your Honor.

12 MR. BRONSTEIN: May I chat with Dr. Weingarten
13 on this, and if that cannot be done -- my reason for
14 the nine o'clock appointment, Mr. Rastelli would have
15 to appear on an empty stomach for a GI series. I
16 don't know what Dr. Smith's necessity would be, if
17 Dr. Weingarten has any objection. We would be happy
18 pursuant to the terms of the same order to have him
19 produced at Dr. Smith's first.

20 MR. ROSEN: Dr. Smith is here, your Honor.
21 Maybe we can make an arrangement right now.

22 THE COURT: Where is Dr. Smith's office?

23 MR. ROSEN: Doctor, where is your office?

24 DR. SMITH: Greenpoint.

25 MR. ROSEN: Want to come up?

Hearing March 19, 1976.

1 THE COURT: He could go from Dr. Weingarten's
2 office to Dr. Smith's office.

3 MR. BRONSTEIN: Would Dr. Smith have any need
4 to have Mr. Rastelli produced on an empty stomach?

5 MR. SMITH: Not necessary for me because of
6 X-ray facilities at the office.

7 THE COURT: You would be willing to accept
8 Dr. Weingarten's X-rays, and whatever GI series he
9 has?

10 MR. BRONSTEIN: If he does, I assume he will,
11 if your Honor wants to endorse the order to produce
12 him -- Judge, this is a remedial measure, if the
13 Marshal could be instructed to take him, Mr. Rastelli,
14 to the nurse's office, and Dr. Smith advises us he
15 can perform his examination right now as far as
16 Dr. Smith's examination goes.

17 MR. ROSEN: I would not have any objection to
18 that type of procedure. I would like for all concerned --
19 I would like to speak to the doctor afterwards.

20 THE COURT: You are going to come into this
21 case, Mr. Rosen?

22 MR. ROSEN: Judge, I want to come into this
23 case.

24 THE COURT: I can't talk to you until you
25 legally file a notice of appearance.

Hearing March 19, 1976.

MR. ROSEN: Counsel can talk for me.

MR. WILLSON: If your Honor pleases, the defendant has leave of the Court to address the Court?

THE COURT: I want to settle this question first. Is there any reason why I can't ask the Marshals to have Dr. Smith examine the defendant?

MR. WILLSON: If we are permitted to speak to the Doctor.

MR. BRONSTEIN: We just provide the facility for this to take place. If there is any report, we will ask for a copy.

THE COURT: Marshal, take the defendant down and let Dr. Smith examine him.

What else?

MR. WILLSON: The defendant has asked leave of the Court to address the Court.

THE COURT: I would prefer not to at this stage.

MR. ROSEN: Tell him what you want to tell him.

MR. WILLSON: He wants to speak here.

MR. P. RASTELLI: What is this, this is nothing here (indicating).

THE COURT: You're going to be examined by doctors.

MR. P. RASTELLI: I am sick. Judge, this is no joke.

1 no joke. Hearing March 19, 1976.

2 THE COURT: I want to make a determination.

3 MR. P. RASTELLI: I want to go to go to trial
4 as much as anybody else. I want to find out why I am
5 here.

6 THE COURT: Any objection to him being examined
7 by the Government's physician on March 23rd?

8 MR. WILLSON: Not as long as we have our
9 examination today.

10 THE COURT: All right. I will sign the order.
11 That takes care of Mr. Phillip Rastelli.

12 I think Mr. Newman has something to say with
13 respect to Mr. Louis Rastelli.

14 MR. NEWMAN: Your Honor knows that Mr. Louis
15 Rastelli is a paraplegic. The last time this hearing
16 was on I indicated on the record a willingness on my
17 behalf to have Mr. Louis Rastelli, himself, examined
18 by any doctor the Government sees fit to select. We
19 talked about a prospective date for that, and the
20 date we talked around was March 1st. As a result of
21 many mechanical problems, the ultimate examination
22 took place last Tuesday I believe it was. Prior to
23 that, and on the previous Thursday, I had him examined
24 by my own doctor. When I say my own doctor, I mean a
25 doctor which we selected. I have received an oral

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1 report from my Doctor. I understand from the oral
2 report that my doctor contends he is not physically or
3 mentally able to stand trial. I have not seen a
4 medical report from the Government's doctor. I was
5 told this morning in words --

6 MR. BRONSTEIN: Can I reframe that, Mr. Newman?

7 MR. NEWMAN: I haven't finished, Mr. Bronstein.

8 I was told in words or substance by
9 Mr. Bronstein what he says the substance of the oral
10 report is that he received from his doctor. I am not
11 asking your Honor to be in a vacuum to decide. This
12 situation, if I understand Mr. Bronstein correctly --
13 the upshot of the report, forgetting about whether
14 we get down to the nitty-gritty of his physical ability
15 to stand trial, the situation that Mr. Bronstein was
16 suggesting was an abbreviated -- at best an abbreviated
17 trial schedule of 10 to 12 in the morning, and either
18 two till four in the afternoon or 2:30 to 4:30 in the
19 afternoon with certain safeguards in the sense of
20 having a male attendant here from the VA Hospital with
21 arranging for the VA to transport.

22 My doctor tells me orally of special diets,
23 private treatment, the inconveniences involved. If
24 Mr. Bronstein would concede that there is no question
25 that this man is paralyzed, paralyzed for life, and

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1 one question and maybe a threshold again, and is
2 really that significant to the criminal justice system
3 that if a case is going to take six weeks, and I have
4 something significant to add to that, if a case is
5 going to take six weeks, the normal occupancy, is
6 that seriously injurious to the criminal system, to
7 have a paraplegic on trial from 10 to 12, from two
8 to four, or 2:30 or 4:30, delay a bunch of lawyers,
9 delay a Court, delay a jury, delay everything in order
10 to get him tried when one thing we are agreed on, if
11 we can agree on anything else, that he is condemned
12 for life as a paraplegic no matter what the sentence
13 is.

14 Your Honor has the power to intervene. It is
15 not great reading. All of the separate counsel have
16 discussed it with your Honor before. In the other
17 light, the question your Honor -- we have a tendency
18 to disregard the kind of sentences. No greater punish-
19 ment could be given out if he is found on every count,
20 and if it was a multiple offense. There comes a time
21 when we have to lay aside legal niceties, say we are
22 beating a dead horse, so to speak.

23 I, in a moment of insanity, undertook to
24 represent the corporation. The result, I am married
25 to this case for eight or ten weeks whether you sever

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1 Louis Rastelli or don't sever Louis Rastelli. So,
2 we can plan to have a trial from 10 to 12 and again
3 from two to four or plan from 2:30 to 4:30, and we
4 can have 26 attendants all around Mr. Louis Rastelli,
5 but if nature takes its course, and he responds to
6 that course, to put it mildly, Judge, we will have a
7 mess in this courtroom. This to me does not seem the
8 way to try a case, and I know all about the niceties
9 of trial defendants. I heard that subject to the
10 new wrinkles that may be added by these two able
11 prosecutors, and I know the need to go forward with
12 the cases, and I know the need for everybody to have
13 their day in court, but I say, what for.

14 If we are concerned about moving with the case,
15 and you're going to take six weeks and have four trial
16 lawyers all facing the possibility that this man's
17 bowel movements -- it seems to me that this is all
18 likely of being moved down the road to insanity for
19 the reason to have this man sit here on trial, con-
20 victed, if you want, in a battered frame, to have the
21 Government bring him before your Honor to put a sentence
22 upon a lifetime of paralysis, and this is going to be
23 met by, I am sure, a very intelligent statement by the
24 Government to the effect that justice must be meted out,
25 whatever, whether the man is innocent, or not innocent.

Hearing March 19, 1976.

1 He should be so adjudged, and he should be in the
2 courtroom, and this is -- I am presenting the facts to
3 you, Judge, and I really can't understand why it is
4 necessary to put everybody through that kind of
5 situation.

6 MR. BRONSTEIN: I assume, your Honor, that
7 Mr. Newman's impassioned plea is either one for severance,
8 or adjournment.

9 THE COURT: It is for --

10 MR. NEWMAN: I am not asking for any adjourn-
11 ment.

12 THE COURT: He is asking for severance.

13 MR. BRONSTEIN: I assume he is also indicating
14 the need for a hearing to determine the advisability
15 of keeping Mr. Louis Rastelli in the case. Suffice
16 it to say at this point that my indication is that
17 nature does not take its course with Mr. Rastelli for
18 approximately a five to six-hour period. Our physician
19 has indicated his capability to stand trial. We are
20 prepared to take steps that will adequately assure
21 Mr. Rastelli's comfort and well being during the trial,
22 while he is in court, and in the courthouse.

23 Another thing I gather is that Mr. Newman has
24 conceded that there would be a hearing before any such
25 determination would be made by the Court.

Hearing March 19, 1976.

1 MR. NEWMAN: I haven't considered conceding
2 anything. I have not received the information from
3 your physician. I have not gotten to the question of
4 testimony, if medical experts.

5 THE COURT: Maybe it would be wise to seek
6 medical reports as soon as they are available, and
7 I will determine whether we need a hearing. Then we
8 will have a hearing, and if it is necessary, then we
9 will determine whether he should be severed. I always
10 like to listen to the loquaciousness of Mr. Newman.
11 He has been here many times before. He usually doesn't
12 do it to me. He usually does it to that box over
13 there. He is good at it.

14 MR. NEWMAN: At the sake of beating a dead
15 horse, I am wondering if this isn't a case that calls
16 out more for common sense than legal language.

17 THE COURT: I understand your point, Mr. Newman.
18 You don't have to get wound up again. I will read the
19 reports and decide whether a hearing is necessary.
20 If a hearing is necessary, we will have such a hearing,
21 and then I will make a determination whether you're
22 entitled to a severance or not.

23 MR. BRONSTEIN: Well, as soon as we get the
24 report we will get it to both counsel and the Court.

25 THE COURT: I assume whatever happens on the

Hearing, March 19, 1976.

29th, they are going to make some arrangements to transport him from the VA Hospital.

MR. BRONSTEIN: Arrangements have been made with the VA Hospital to provide permanent or portable permanent/portable toilet facility. We had contacted GSA about whether we would be able to erect a portable facility. A male attendant will be provided by the hospital. If there are any dietary problems, as Mr. Newman is concerned, I am sure they could be worked out, or through the hospital. There have been several such problems, and we will be able to accommodate them adequately. Such comparable defendants have been tried before.

THE COURT: All right. Gentlemen, on the 29th.

MR. NEWMAN: You will possibly be seeing me before, if we submit a report.

MR. WILLSON: If I may, Judge, I would like to respond to Mr. Bronstein's statement about Mr. Rastelli being kept down. He is absolutely correct. He indicated to me that he could be admitted back to Clinton at any time. Nonetheless, Judge, we never anticipated the deliberate, and I can't think of it as anything else, the ignoring of Mr. Peace's office by the Superintendent of the Clinton facility which took well in excess of a month.

Hearing, March 19, 1976.

1 The second consideration, Judge, is that
2 Mr. Rastelli was here in Brooklyn. His family is
3 here in Brooklyn. He is going to have the hearing
4 in Brooklyn. His hospital is here in Brooklyn. His
5 pending federal case is here in Brooklyn, and the
6 Court -- we hope it will overturn in Suffolk conviction
7 is here in Brooklyn. We thought it was convenient,
8 and we were hoping we could get the operation done.
9 We were obviously wrong. We weren't trying to impede
10 the Court, or stall, or anything else.

11 THE COURT: I am not disputing anything you
12 have to tell me. You know what I have to do, given
13 the fact as I have it.

14 * * *

Minutes of Hearing, March 24, 1976.

2 UNITED STATES DISTRICT COURT
 3 EASTERN DISTRICT OF NEW YORK

4 -----X
 5 UNITED STATES OF AMERICA, :

6 -against- :

7 PHILIP RASTELLI, et al, :

8 Defendants. :

75-CR-160

9 -----X
 10
 11 United States Courthouse
 12 Brooklyn, New York

13 March 24, 1976
 14 9:30 o'clock A.M.

15 B e f o r e :

16 HONORABLE THOMAS C. PLATT, U.S.D.J.
 17

18 I hereby certify that the foregoing is
 19 a true and accurate transcript from my
 20 notes in this proceeding.

21 *Perry Auereach*
 22 Official Court Reporter
 23 U. S. District Court

24 PERRY AUERBACH
 25 ACTING OFFICIAL COURT REPORTER

EXHIBIT "A"

Hearing, March 24, 1976.

Appearances:

DAVID G. TRAGER, ESQ.
United States Attorney
for the Eastern District of New York

BY: CHARLES WEDITRAUB, ESQ.
Assistant U.S. Attorney

ROY CORI, ESQ.
Attorney for Defendant Rastelli

JACK EVSEROFF, ESQ.
Attorney for Defendant Anthony DeStefano

Hearing, March 24, 1976.

3

1 THE CLERK: The United States vs. Philip Marcilli.

2 MR. WEINTRAUB: Your Honor, there are really two
3 matters to be resolved. First, we dealt with the
4 representation of Mr. DeStefano. Mr. Evseroff is
5 here, and there was question as to the last pre-trial
6 conference whether Mr. Evseroff was engaged or not.
7 I think there are legal issues that are clear on the
8 record.

9 THE COURT: I understand that he starts a case
10 before Judge Weinstein this morning, and that Judge
11 Weinstein will make him available to us as needed. But
12 I also understand you have someone in your office.

13 MR. EVSEROFF: Mr. DeStefano knows that if I
14 am engaged, and if Your Honor wants to start, my
15 partner, Bill Soenshine will start the case.

16 THE COURT: Certainly Mr. Soenshine is a capable
17 lawyer.

18 MR. EVSEROFF: Mr. DeStefano knows that, and
19 he has consented.

20 THE COURT: I don't see the problem.

21 MR. WEINTRAUB: The government is concerned.
22 We have this on the record for Monday morning, and
23 will not be surprised --

24 THE COURT: -- I already told you that Judge
25 Weinstein will cooperate with us; half a day here,

Hearing, March 24, 1976.

4

1 half a day there.

2 MR. EVSEROFF: judge, I must say, I 've never
3 tried two cases at the same time, but I am always
4 willing to learn. But listen, you can only try one
5 at a time, and that is what I have a partner for.
6 Might I know what date this is scheduled for?

7 THE COURT: Monday.

8 MR. WEINTRAUB: That is correct. The other
9 problem is a representation of Mr. Philip Rastelli.

10 THE COURT: I thought I made my position about
11 the appearance.

12 MR. WEINTRAUB: You did, Your Honor. The
13 government has considered the situation as to Philip
14 Rastelli. Yet, quite frankly, we are somewhat con-
15 cerned about the situation. We have concluded that
16 we had consented to the severance of Louis Rastelli.
17 That should shorten this trial, Your Honor, by about
18 a third. Instead of the anticipated six weeks in
19 direct, I think it is fair to say the direct will be
20 concluded in four weeks. Because of that, and because
21 even the appearance that Mr. Rastelli may not have
22 adequate representation, based on his current counsel's
23 admission to your Honor that he has not prepared the
24 government would consent to a one week adjournment.

25 THE COURT: The government has no say in this

Hearing, March 24, 1976.

5

1 matter. The court is not going to grant any adjournment.
2 Mr. Philip Rastelli has had in my book one of the best
3 law firms in Suffolk County. Mr. Sutter is a well-
4 known, and as I understand it, a very competent
5 attorney. I don't for one minute for one minute believe
6 that Mr. Sutter is not capable of trying this case.
7 Mr. Philip Rastelli, at this point of the game, wishes
8 to substitute counsel, and he does so. If counsel
9 wishes to undertake a representation of this case
10 after it's present posture for a year and a couple of
11 months, they do so at this count. There is no danger
12 that I see in this. There was a date set by the
13 parties and their counsel. The trial was set, and
14 everybody said they would be ready. And I have moved
15 everything around in this court, and in several other
16 courts, to have this space available starting March
17 29th for this trial and I am not going to change. The
18 judges in this court have a very busy schedule. In
19 this case it is not fair. Just because Mr. Rastelli
20 at this point wants to change his mind and get another
21 counsel. I make my position abundantly clear. You
22 can mandamus me to the Court of Appeals, and if they
23 say under these circumstances that I must grant a
24 week's adjournment, then it is on their bounds to
25 foul up my calendar, and every other calendar in this

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6

1 court for the rest of the Spring, and if they want to
2 interfere with the District Court's calendar, God
3 bless them.)B

4 MR. COHN: May it please the court. My name is
5 Roy Cohn of the firm of Saxe, Bacon and Polan. Mr.
6 Rosen was out here the other day. As your Honor has
7 been told, this matter came to us very recently through
8 a friend and client of our firm. I talked to Mr.
9 Rastelli for the first time yesterday. Mr. Rosen has
10 talked to him on a couple of occasions. If there was
11 the usual case for counsel juggling or something that
12 would institute an interference with the court calendar,
13 I can fully understand Your Honor's position, but based
14 upon what we know, these weaknesses, lawyers have and
15 clients have in this last minute juggling, once in
16 a while there does come an honest situation.

17 THE COURT: I am not procuring anyone's honesty
18 at this stage. In such a case where a case has been
19 pending for over a year, just at this point he has to
20 take the consequences.

21 MR. COHN: That is what I am addressing myself
22 to. We are not talking about one year. We are talking
23 about one week. Mr. Weinberger has told your Honor
24 this morning that by a severance that has been granted,
25 a third of the trial is being cut off. So the termination

1 date for Your Honor's conclusion will be met. In
2 fact, it will be better than your Honor had allowed
3 for, so there is absolutely no adverse effect on the
4 calendar of this court or the administration of
5 justice.

6 THE COURT: That is why you have no idea what
7 you are talking about.

8 MR. CORN: I really don't?

9 THE COURT: Making a statement like that.

10 MR. CORN:: I am sure it is my inexperience and--

11 THE COURT: It certainly is. Itportly a
12 definite inexperience. You will understand why you
13 are so ignorant. I want to treat you with the utmost
14 courtesy. In this kind of a case, at this juncture,
15 I am not being mean and harsh and arbitrary and un-
16 reasonable. I am charged with the responsibility of
17 trying I don't know how many cases in this District,
18 and also with a backlog of civil cases, going back to
19 1969. Plaintiffs yelling at me that they want some
20 relief, and I can't just return my calendar that day.

21 MR. CORN: Your Honor, a third of the case
22 before you has now been eliminated, so that your
23 completion date will be way ahead of the time.

24 THE COURT: If your client plead guilty tomorrow
25 it wouldn't alleviate my situation, except by a drop

Hearing, March 24, 1976.

1 in the bucket. You don't understand what I am saying.
2 We are two judges short in this court. We have been
3 waiting for a year and a half for a replacement for
4 Judge Travia who resigned in November a year and a
5 half ago. Congress for 5 years has promised us an
6 additional judge. That bill is still bottled up until
7 elections in the fall of 1976. Judge Neere just
8 collapsed from exhaustion because he couldn't keep
9 the pace any more, and he is in St. Cumberbund Hospital,
10 and you are in here saying to me that you want to
11 bottle up my calendar. (The answer is no, and I direct
12 you to order this record and to take it to the Court
13 of Appeals if they mandamus me.))

14 MR. COHN: Your Honor, should your Honor enter
15 a formal order to this as a prelude to the mandamus,
16 a judgement on a one-week continuance consented to
17 by the government. But, if your Honor brings this as
18 being a crumbling of justice --

19 THE COURT: Go ahead.

20 MR. COHN : (continuing) Should we submit a
21 formal order.

22 THE COURT: Go ahead.

23 MR. WEINTRAUB: My office has discussed this
24 with Mr. Trager and it is under consideration whether
25 any summary action should be recommended against

Hearing, March 24, 1976.

9

2 Mr. Sutter's office based on the representations made
3 in this court.

4 THE COURT: Whether I should take any summary
5 action?

6 MR. WEINTRAUB: Whether you should consider his
7 office, perhaps an order to show cause for contempt or
8 its disciplinary action based on Mr. Sutter's repre-
9 sentation here. That is just under consideration,
10 your Honor.

11 MR. COHN: Fortunately, your Honor, we have the
12 situation where I am sure Mr. Sutter must have some
13 excuse or reason. I hope it is a good one why the
14 prior counsel stands up and says "We haven't just pre-
15 pared this case." And I guess the fairness calls for
16 that a defendant is not pilloried anytime, and whether
17 there is an admission as to whether the fault lies.
18 We would all solve this by a one week adjournment in
19 which a new counsel could come in without being delayed.
20 If this rents a seam in your Honor's plans, I am afraid
21 we have all tried so hard to do something that is going
22 to solve the problem.

23 THE COURT: I said all I am going to say.

24 MR. COHN: Thank you, Your Honor.

25 MR. WEINTRAUB: Thank you.

Affidavit of John Joseph Sutter, Sworn to
March 26, 1976.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-----X

UNITED STATES OF AMERICA,

: AFFIDAVIT

- against -

: INDICTMENT #75 CR 160

PHILIP RASTELLI,

:

Defendant.

:

-----X

STATE OF NEW YORK)

ss.:

COUNTY OF NASSAU)

JOHN JOSEPH SUTTER, being duly sworn, deposes and says:

That I am an attorney at law duly admitted to practice in this court and am the attorney of record for the above encaptioned defendant. That the above encaptioned matter is currently scheduled for trial on Monday, March 29, 1976.

That your deponent on March 8, 1976 commenced the trial of the People of the State of New York against Gregory V. Charmont in the Nassau County Court before the Honorable Alfred F. Samenga, County Judge. That your deponent was retained a mere ten days prior thereto when previous counsel became unavailable. That the charges in that case include two counts of attempted murder of police officers which, upon conviction, could subject the defendant Charmont to a sentence of life imprisonment.

That when your deponent commenced the Charmont trial

Affidavit of John Joseph Sutter.

he was neither unaware nor neglectful of the outstanding certificate of engagement issued by this court requiring your deponent to appear in this court in the above encaptioned matter on the 29th day of March, 1976. Nonetheless, your deponent was ordered to commence trial on these serious charges and did so in view of the fact that your deponent felt that the matter could be concluded well in advance of March 29th.

That such has not been the case and trial continues and your deponent will still be actually engaged on March 29th, and, upon information and belief, the source of your deponent's information and belief being the estimate of the prosecuting authority, the trial should continue for another two and one-half weeks.

That accordingly, if your deponent remains the attorney of record, it is respectfully requested that the trial of the within matter be adjourned for a four week period to enable your deponent to complete his present engagement on trial and review the preparation had on the within cause. That additionally, your deponent is informed that the defendant is seeking a substitution of counsel by the firm of Mike Rosen, Esquire, though formal substitution has not yet been had as of this date and your deponent has no objection to such substitution of counsel.

Affidavit of John Joseph Sutter.

However, should your deponent remain counsel of record the following facts and circumstances are urged upon the court for its consideration.

As heretofore related to the court by your deponent's associate, Mr. Willson, my trial commitments and pressures of office business have minimized my personal preparation of the within indictment. Since last April, your deponent has been engaged in what amounts to a running battle with the District Attorney of this County regarding a so-called "anti-corruption" Grand Jury, the legitimacy of its proceedings, and indictments of public officials resulting therefrom. Such activities have required not only numerous court appearances, but multiple evening and weekend office hours in consultation with the numerous public officials and others involved, all in addition to my regular trial and office commitments.

Mr. Willson, who has aided in our futile efforts to get this defendant the necessary medical attention he requires, has been extremely handicapped in aiding with the preparation of the within cause due to his own numerous court commitments and the fact that, since his total disability due to mononucleosis, viral hepatitis and neuropathy during January and February of 1975, he has been under his personal physician's orders to limit his working activity to as nearly a normal daily routine as is

Affidavit of John Joseph Sutter.

possible (nonetheless during this period he has suffered from nine viral attacks due to his lowered resistance which required his absence from work anywhere from one to six days at a time). Additionally, the sole library (with F 2d and F. Supp.) accessible to him during the daytime hours in Nassau County is only opened during those hours court is in session and is closed on weekends. His activity has been further restricted of late due to the fact that his wife expects their first child within the next two weeks.

It is most respectfully submitted that from the foregoing facts, since the defendant has heretofore waived and is currently willing to waive his statutory speedy trial rights for such limited period as is necessary for commencement of the trial with counsel of his choice, with adequate preparation that the ends of justice and the Sixth Amendment rights of the defendant are best served by the requested adjournment, and far out weigh the interest (if any there be) of the public in a speedy trial and compulsion to immediate trial could well result in a miscarriage of justice.¹

That additionally, the crime for which the defendant now stands convicted and incarcerated (a state conviction in

¹Title 18, United States Code, Section 3161, (h)(8).

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Suffolk County; the defendant being technically free on bail in the instant case) resulted solely from testimony of a witness who was under indictment at that time for possession of a forged instrument, falsification of business record, grand larceny and perjury. That witness' case (indictment no. 85-72, Suffolk County) was finally disposed of on March 19th after a more than four year hiatus. That witness swore at the trial and it was vouched for by the trial prosecutor that he had made no deals nor had received any promises or assurances from the then Chief Assistant District Attorney, Mr. Nadjari, and then head of the Rackets Bureau, Mr. (now Family Court Judge) Fierro. That your deponent has recently received copies of the minutes of the disposition of that witness' case wherein he was permitted to plead to a charge of attempted grand larceny in the third degree (a misdemeanor) and was immediately sentenced to a conditional discharge. The Suffolk County Clerk's minute book shows no motions were ever made addressed to that witness' indictment despite his representation by one of the best known law firms in Suffolk County.

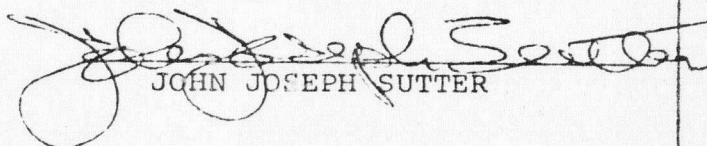
Accordingly, it would seem most likely that upon an immediate writ of coram nobis in the state courts the conviction

Affidavit of John Joseph Sutter.

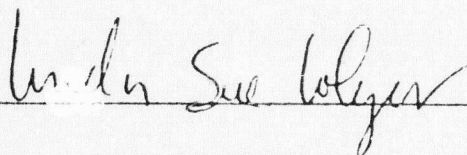
for which the defendant now stands incarcerated would be reversed.²

Should this be the case, it has been your deponent's experience that a free defendant is far more able to assist in his defense on a daily basis during the evening office hours in preparation for the next trial day, and that conversely the incarcerated defendant faces a severe prejudicial handicap in trial preparation, and it would seem manifest an adjournment for this reason alone would be in the best interests of justice.

WHEREFORE, for all the reasons above stated it is respectfully requested that the trial of the within matter be adjourned for a minimum period of four weeks to any date convenient to the court and prosecution.


JOHN JOSEPH SUTTER

Sworn to before me this
26th day of March, 1976.



LINDA SUE COLYER
NOTARY PUBLIC, State of New York
No. 30-4613217
Qualified in Nassau County
Commission Expires March 30, 1977

²United States ex rel Washington v. Vincent, U.S. Court of Appeals, 2nd Circuit, decided November 5, 1975.

Affidavit of John Joseph Sutter.

cc:

Hon. David Trager
United States Attorney for the
Eastern District of New York
225 Cadman Plaza East
Brooklyn, New York

Hon. Jacob Mishler
Chief Judge
United States District Court for the
Eastern District of New York
225 Cadman Plaza East
Brooklyn, New York

Gustave V. Newman, Esq.
522 Fifth Avenue
21st floor
New York, New York

Jacob Evseroff, Esq.
186 Joralemon Street
Brooklyn, New York

Michael Rosen, Esq.
39 East 68th Street
New York, New York

Minutes of Hearing, March 29, 1976.

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA, :

-against-

75-CR-160

PHILIP RASTELLI, LOUIS :
RASTELLI, ANTHONY DE STEFANO, :
CARL GARY PETROLE, WORKMEN'S :
MOBILE LUNCH ASSOCIATION, :

Defendants. :

United States Courthouse
Brooklyn, New York

March 29, 1976
9:30 A.M.

B e f o r e :

HONORABLE THOMAS PLATT, U.S.D.J.

I hereby certify that the foregoing is
a true and accurate transcript from my
stenographic notes in this proceeding.

Perry Auerbach
Official Court Reporter
U. S. District Court

PERRY AUERBACH
ACTING OFFICIAL COURT REPORTER

Hearing, March 29, 1976.

Appearances:

DAVID G. TRAGER, ESQ.
United States Attorney
for the Eastern District of New York

BY: CHARLES WEINTRAUB, ESQ.
CARL C. BORNSTEIN, ESQ.
-and-
ALLAN K. SLEPPIN, ESQ.
Assistant U.S. Attorneys

J. EVSEROFF, ESQ.
Attorney for Defendant De Stefano

G. NEWMAN, ESQ.
Attorney for Defendant Louis Rastelli

E. PEACE, ESQ.
Attorney for Defendant Petrol

Also present:

JOHN LANG, ESQ.

STEPHEN L. WILSON, ESQ.

WILLIAM SONENSHINE, ESQ.

Hearing, March 29, 1976.

THE CLERK: United States v. Philip Rastelli,
Louis Rastelli, Anthony De Stefano and Carl Gary
Petrole.

MR. WEINTRAUB: Good morning, your Honor.

MR. LANG: My name is John Lang from the firm of
Saxe, Bacon and Bolen. I am not sure at this point
whether we represent anyone.

THE COURT: I am not so sure that you do. It
didn't occur to your firm that you pointed out to the
Court of Appeals that you didn't represent Mr. Rastelli
when you took the mandamus pleading.

MR. LANG: I understand there has been no
formal ^{sub}stitution. If that is the requirement, of
course it hasn't been done, but yesterday, for example,
I went down to see Mr. Rastelli at the Federal House of
Detention, and again I don't know whether we have
representation or what. I know Mr. Wilson was here
from the firm of Sutter, Moffatt, Yannelli and Zevin
representing Mr. Rastelli.

THE COURT: As far as I know, he still is.

MR. LANG: I am not arguing with you on that.

THE COURT: I have nothing in my files to show
there was a substitution.

MR. LANG: You see --

1 THE COURT: What are you here for? How can you
2 come in and talk for a formal substitution substituting
3 yourself as counsel? I don't understand this type of
4 practice. Maybe it has changed without my knowing it.
5 It has always been my understanding that a person had
6 to be formally retained and had to file a notice of
7 appearance if you are going to appear for him and talk
8 in court. It hasn't occurred to you that you brought a
9 mandamus with respect to this case to the Court of
10 Appeals, file papers in here made applications, and so
11 forth, and you are still not substituted.

12 MR. LANG: You know, Judge, we are in this kind
13 of a hiatus where there is a question of the attorney
14 of record who is supposed to be here. Mr. Wilson is
15 here.

16 MR. WILSON: Mr. Sutter is actually engaged.

17 THE COURT: I talked to Judge Semanka to find
18 out whether Mr. Sutter was engaged, and I discussed
19 with him a certificate of engagement in this court.
20 When I got Mr. Sutter's affidavit on Friday, I was
21 amazed that such an affidavit should be filed, and
22 there was no reference in that affidavit that he had
23 made application to the Court in that case that he was
24 actually going to be engaged on another trial here,
25 and Judge Semanka confirmed the fact that no such
application had been made to him and he was totally

1 unaware of it. He said that had he known it, he would
2 have honored the engagement here. Under the circum-
3 stances, I don't see that I can honor Mr. Sutter's
4 application.

5 MR. WILSON: I think [✓]verybody had known that the
6 trial would go --

7 THE COURT: Mr. Wilson, it makes no difference
8 whatsoever. If Mr. Sutter is not going to fulfill his
9 professional responsibility to the various courts in
10 which he appears, I am certainly not going to honor his
11 engagement.

12 MR. WILSON: Perhaps that is the problem.

13 THE COURT: If he took too much, then he has to
14 suffer the consequences.

15 MR. WILSON: Judge, I don't think the 180-day
16 ruling was designed to --

17 THE COURT: In fairness, you are going to have
18 to try the case.

19 MR. WILSON: His defendant currently faces a
20 maximum exposure of a lifetime imprisonment.

21 THE COURT: I say I think you are going to have
22 to try the case.

23 MR. WILSON: The defendant does not want me to.

24 MR. PHILIP RASTELLI: I don't retain Mr. Wilson.

25 THE COURT: You retain a firm.

1 MR. WILSON: No, sir, your Honor. That is not
2 correct. Mr. Rastelli's agreement --

3 THE COURT: The only alternative you leave me,
4 Mr. Wilson, is to fine Mr. Sutter.

5 MR. WILSON: That is the alternative.[?]

6 THE COURT: You speak for Mr. Sutter, as well.
7 If you want me to fine Mr. Sutter as a result of his
8 contact, I will. The other alternative is for you to
9 go to trial.

10 MR. WILSON: Judge --

11 THE COURT: You are ready.

12 MR. WILSON: Incidentally, Judge, I have the
13 latest doctor's report on Mr. Rastelli pursuant to his
14 examination on the 19th, which I have provided copies to
15 the U.S. Attorney, and to Mr. Lang's firm in regard to
16 the physical condition. Judge, while we are on it, it
17 is interesting to note that I sought a writ of habeas
18 corpus similar to the relief that I sought here in the
19 Supreme Court in New York County, They refused to sign
20 the writ because they said the federal courts had
21 jurisdiction. And so that currently is in total limbo,
22 but that is the status of that particular matter. I
23 don't see how I can fairly try this case for
24 Mr. Rastelli when he desires me not to try this case.
25 When he desires Mr. Sutter as counsel, who was

1 understood would be his counsel upon trial.

2 THE COURT: Well, Mr. Wilson, if you are going
3 to take that position and Mr. Sutter is not here, and
4 you are going to refuse to try the case, the alternative
5 would be a fine of \$1,000 a day on Mr. Sutter until he
6 appears.

7 MR. WILSON: Is that without a hearing, Judge?

8 THE COURT: I don't see I have any alternative.
9 If Mr. Sutter wants to come in and be heard, fine. He
10 is not here.

11 MR. WILSON: Judge, I would like an opportunity,
12 could you call Judge Semanka to see if he would release
13 him for a period of time?

14 THE COURT: I did. He said he would not.

15 MR. WILSON: Judge Semanka would not release him
16 to come in here?

17 THE COURT: He said he would release him for a
18 two- or three-day trial.

19 MR. WILSON: Just, your Honor, for discussing the
20 fine of \$1,000 a day, regarding this particular matter.

21 THE COURT: I didn't discuss the potential fine.
22 I said I would have to discuss.

23 MR. WILSON: I would like an opportunity, then,
24 Judge, to make contact with Mr. Sutter, if I could, and
25 tell him of the situation in order that he may get

Hearing, March 29, 1976.

1 permission of Judge Semanka and address the Court on it.

2 THE COURT: You may.

3 MR. WILSON: Thank you.

4 THE COURT: Go ahead and make a telephone call,
5 and we will call it again in a few moments.

6 MR. NEWMAN: My client is not here yet, Judge.

7 THE COURT: I thought you just had the
8 corporation to deal with. I thought you were going to
9 sever the case.

10 MR. BORNSTEIN: I heard from the hospital about
11 ten after nine, and they said that Mr. Louis Rastelli
12 was on the way. I don't know where he is at this point,
13 but certainly he is not in the hospital.

14 MR. LANG: Your Honor, may I be excused? I just
15 got a call from my office. It is urgent.

16 MR. NEWMAN: May we leave the presence of the
17 Court, Judge?

18 THE COURT: Yes.

19 (Time noted: 10:30. Recess taken.)

20 MR. WILSON: I just spoke to Mr. Papa of our
21 office, Judge. He is the businessman who will be
22 writing the \$1,000 checks, and he is going over to
23 Judge Semanka's part and see if he can get Mr. Sutter
24 to contact your Honor's chambers.

25 THE COURT: I don't think it is going to do him

Hearing, March 29, 1976.

any good to contact my chambers. If he wants to come in here --

MR. WILSON: Yes, sir. With regard to speaking to your Honor about getting in here to talk to you about this.

THE COURT: I am here. He can come in at any time. As far as I can see, I assume you are just going to refuse to go ahead. I want to check on the notice of appearance on your firm's stationery. If your firm appeared you may have a problem.

Apparently, John Joseph Sutter appears.

MR. WILSON: I believe the certificate of engagement was issued in the name of John Joseph Sutter.

THE COURT: Regardless of it, it looks like he has got another problem. I think, so that the record is clear, I would like to recite the facts with respect to the record in this case which are quite different from the record that was presented to the Court of Appeals in the mandamus proceeding. So that the record will be clear as to why the Court is taking the actions it proposes to take. The docket sheet shows that on March 5th a seal of indictment was filed and ordered sealed in this case on March 5 of 1975, and on March 6th, the defendant was produced on a bench warrant, all except for one of the defendants,

Hearing, March 29, 1976.
De Stefano, and the indictment was unsealed, and on March 14th there was another arraignment. In this case the Government filed its notice of readiness on March 18th, and on March 21st I called the case for trial and said that it would go forward in the trial on April 4th of 1975.

On April 2nd I got a telegram from Mr. Sutter's office asking for an adjournment and saying that Mr. Rastelli had just been admitted to the hospital. That was the first application for a last-minute application that was for an adjournment. That is a full year ago.

On April 18th, it was recalled again for a status report.

On May 9th it was recalled again, and Mr. De Stefano was arraigned. On May 23rd there was a hearing held. The case was set down for September 5th for a trial. On that date there was a further request by the defendant for an adjournment to November 7th with the understanding that we would go to trial the following week on November 10th. At that time a further request for an adjournment was made by the defendants for a trial date, and at that date they wanted the trial was right after the 1st of the year.

I told them I would hold my calendar open. On

Hearing, March 29, 1976.

11

1 December 29th, another last-minute motion was made by
2 the defendant, Philip Rastelli, to adjourn, asking for
3 a hearing to determine the physical capacity of
4 Mr. Philip Rastelli to stand trial.

5 On January 2nd, an adjournment was requested so
6 that additional medicals could be obtained with respect
7 to that hearing, and I signed an order having the U.S.
8 Marshals deliver Philip Rastelli for the purpose of the
9 physical examination, and on that date, if my memory
10 serves me correctly, I asked the defendant on what
11 date they would be ready for trial. All of the
12 defendants picked March 29th.

13 The Government objected strenuously to that long
14 an adjournment. I gave the defendants an adjournment to
15 this morning with the understanding that everybody would
16 be ready; the medical examinations would be over at
17 that time. Each of the counsel asked me for a
18 certificate of readiness.

19 My recollection is that I gave them that. I
20 told them to make it known to any court where they were
21 involved that they would be involved here at this court
22 and they all assured me that they would be here and
23 ready on March 29th. Just shortly before that, my
24 chambers began to get rumors of further applications
25 for adjournment, so I asked counsel to appear on

1 March 19th, and that was the first I understood

2 Mr. Sutter would be substituted, and that was the first
3 I heard that another counsel wished to come in, and that
4 was the first time I heard of a further request for
5 adjournment.

6 Now, gentlemen, it was not in any sort of being
7 arbitrary or unreasonable. I recite that history
8 because I think it's completely at variance to what has
9 been presented to the Court of Appeals in the Second
10 Circuit. But those are the facts of this case, and
11 that is the history of this case, and that is the reason
12 why this Court wants to go to trial today.

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14 (continued next page)
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Hearing, March 29, 1976.

13

1 MR. WEINTRAUB: Might I supplement that? On

2 January 2nd the Government made a motion for adjournment
3 because a key Government witness had undergone surgery.

4 THE COURT: On what day?

5 MR. WEINTRAUB: January 2nd, and we represented
6 to the Court that based on the recovery period, the
7 doctors had estimated that the earliest days the
8 Government would be prepared to go forward with that
9 would be March 1st, and then there were conversations
10 in front of your Honor, and a date agreeable to all was
11 reached at March 29th.

12 THE COURT: I just got word that the Court of
13 Appeals denied the writ, but requested that it be
14 considered under the denial of the request for a
15 continuance, and they conceded that they have no power
16 under Stans v. Gagliardi, to grant the writ.

17 Gentlemen, for the reasons I have just stated,
18 if this thing had been properly presented to the Court
19 of Appeals, I would think some basis would be merited,
20 but I don't see any basis for the request. I don't
21 think that any of these were presented to the Court of
22 Appeals. I think the record I just recited here, instead
23 of being the facts supporting this Petitioner as
24 follows, you say to the Court of Appeals, "The
25 Petitioner was indicted on or about March 5, 1975.

1 Pursue to the seven-count indictment, the Petitioner
2 faces potential incarceration for the rest of his
3 natural life. The Petitioner has retained the law firm
4 of Sutter, Moffatt, Yannelli and Zevin, P.C. to defend
5 him in the action. No pretrial motions were made on
6 behalf of the petitioner, and a trial date of March 29,
- 1976 was set."

8 As if a year and a couple of months had gone by
9 with nothing happening in this case, and I have just
10 finished reciting what happened in this case, and if
11 there ever was a misleading statement given to a court,
12 and what I think was a wholly reprehensible statement.
13 In the light of what transpired, there was.

14 As far as I am concerned, the case is ready, and
15 as far as I am concerned, Mr. Sutter is. If his firm
16 is not prepared to try it, he is going to have to pay
17 the consequences. I can't force Mr. Wilso on trial,
18 unfortunately, because he pointed out he did not file
19 a firm notice of appearance. But all I can do is fine
20 Mr. Sutter. So I will impose a contingent fine of
21 \$1,000 on Mr. Sutter for his failure to appear in
22 accordance with the mandate of this Court.

23 I will give him an opportunity to address this
24 Court and be heard on the subject, and I will call the
25 case on a day-by-day basis with all other attorneys

Hearing, March 29, 1976.
being deemed engaged until Mr. Sutter is free.

15

MR. PEACE: Might I request I be permitted to contact the Court and be notified when I would actually be needed here? I have a practice to look after.

THE COURT: Mr. Peace, I agree. I am very sympathetic to you, but if I don't require you gentlemen to appear as if you are on trial here, the next thing I know, one of you is going to be on trial in some other case. As far as I am concerned, you are on trial here, and I am not going to let this happen again in this case. I should never have let Mr. Sutter even get out of here on January 2nd. I should have held him here from January 2nd to date.

MR. PEACE: I would not start another trial.

THE COURT: Mr. Sutter started another trial.

MR. PEACE: I am not talking about Mr. Sutter. I am talking about myself right now, and I would just request that I be contacted and be told whether I have absolutely to be here, and if he tells me to come, I will come. It is a long trip, and I am preparing now for a long trial and there are so many things that I can do to help earn my living in my own office. I have not shown this Court any discourtesy in any event.

THE COURT: I don't think you have, Mr. Peace. As long as you are fully cognizant of the fact that

Hearing, March 29, 1976.

1 you are fully engaged, if you don't appear you know what
2 the penalty will be.

3 MR. PEACE: If you tell me to come, I will come.

4 THE COURT: I don't know when Mr. Sutter is
5 going to appear and say, "I am ready." I have persuaded
6 Judge Zemanka to let me know by this afternoon. You
7 might not know until tomorrow morning, and you might
8 hold the whole works up.

9 MR. PEACE: Judge, I wouldbe in constant contact
10 with Mr. Sutter. I am not going to hold up this case,
11 Judge; there is no way I am going to do this with the
12 Court's consideration of permitting me of not having to
13 come in in the morning. If you show me a courtesy, I
14 am not going to return it with a discourtesy. I just
15 wouldn't do such a thing.

16 THE COURT: Well, you can play it the way you
17 want, but I am saying to you, if he shows and they are
18 all ready, and you are not here, as far as I am
19 concerned you are all engaged here.

20 MR. PEACE: I will be here.

21 THE COURT: Does anybody want to be notified
22 when Mr. Sutter appears here to make whatever
23 application he wishes to make to the Court?

24 MR. PEACE: Would the Court excuse us physically
25 at this moment?

1 THE COURT: No. The next thing I think we have

2 to consider is this medical problem. Is Mr. Wilson
3 prepared to address himself to that or not?

4 MR. WILSON: Judge, I have submitted the latest
5 report of Dr. Smith. I have not seen the latest report
6 of Dr. Weingarten.

7 THE COURT: Show him that, and we still have got
8 Mr. Newman's motion for a severance solely as to
9 Mr. Philip Rastelli.

10 MR. NEWMAN: Louis Rastelli.

11 THE COURT: Solely as to him.

12 MR. NEWMAN: I can't very well claim the
13 physical condition of the corporation. I don't have
14 the corporate minutes, but I don't know that that is a
15 basis for a severance, frankly.

16 THE COURT: Hello, Mr. Sonenshine.

17 MR. SONENSHINE: Good morning, your Honor. I
18 have very little to say or contribute or detract or
19 do anything else, only waiting for something that
20 doesn't occur. That is my only hope. Other than that,
21 I have no requests to make.

22 MR. WEINTRAUB: Your Honor, the Government is
23 prepared upon the appearance of the Plaintiff, Louis
24 Rastelli, in court, to consent to his severance and to
25 move to sever the corporate defendant.

Hearing, March 29, 1976.

18

1 THE COURT: You are not going to try the
2 corporation?

3 MR. WEINTRAUB: No, sir.

4 THE COURT: I don't see the basis for the
5 severance from the corporation. Do you plan on
6 re-trying the corporation at some other time?

7 Because you won't get it on that basis.

8 MR. WEINTRAUB: No, sir.

9 THE COURT: You are going to dismiss as to the
10 corporation?

11 MR. WEINTRAUB: Yes, sir.

12 THE COURT: Have you got authority?

13 MR. WEINTRAUB: Not at this point, but I don't
14 anticipate any problem with that, your Honor.

15 THE COURT: Well, you are not going to get two
16 trials.

17 MR. WEINTRAUB: I understand that.

18 THE COURT: Have you got verbal authority?

19 MR. WEINTRAUB: No, sir, I do not.

20 THE COURT: Then you'd better get verbal authority
21 before you actually make the motion to go through with
22 the motion to sever.

23 MR. WEINTRAUB: Very well, your Honor, we will
24 hold off that motion.

25 THE COURT: It is not that. I just don't want to

Hearing, March 29, 1976.
go through two trials.

1
2 MR. WEINTRAUB: I would like to raise one other
3 thing, your Honor. We have been juggling numerous
4 witnesses right now. Some witnesses are from out of
5 town and are here this morning, and it is going to be
6 very difficult to keep them here on a day-to-day basis.
7 If your Honor is agreeable, I would like to suggest that
8 the date Mr. Sutter appears, and again we select a jury
9 and open and begin evidence.

10 THE COURT: Mr. Weintraub, I don't know what I
11 can do on this thing. Mr. Wilson refuses to go ahead.
12 Mr. Sutter has not appeared. Judge Zemanka, with whom
13 I talked this morning, said he would make Mr. Sutter
14 available for a two- or three-day trial, but he didn't
15 think he could make him available for the lengthy trial
16 that is given here. Given those facts, I don't see
17 that I have anything I can do now, except wait and see.

18 MR. WEINTRAUB: Perhaps I didn't make myself
19 clear, your Honor.

20 THE COURT: It may be two and a half to three
21 weeks from now.

22 MR. WEINTRAUB: For that very reason, I would
23 request that the Court now indicate that when we do
24 proceed, when Mr. Sutter is here and ready and we
25 proceed to trial, that the first day be set aside for

1 selection of jurors and opening statements so that we
2 will have one day's breathing space to get out-of-town
3 witnesses here to go on the stand the next morning.

4 THE COURT: I think that would be agreeable to
5 everybody.

6 MR. NEWMAN: I have no problem with that.

7 MR. SONENSHINE: One day after he appears?

8 MR. LANG: That would be no problem. If I may,
9 by the time we really get this going, we would come in the
10 case, Judge, if we could get April 5th.

11 THE COURT: You may have two and a half weeks to
12 make up your mind, for all I know.

13 Mr. Sutter may run up \$1,000 a day. That is up
14 to you and Sutter.

15 MR. WILSON: May I clarify one thing, Judge.
16 Your Honor said Mr. Wilson refused. In all likelihood
17 I would refuse because of my wife's condition.

18 THE COURT: I can't force you on, Mr. Wilson.
19 If I could I would. I would.

20 MR. WILSON: And given my wife's current
21 condition, Judge, I would probably refuse, too.

22
23 (continued next page)
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25

Hearing, March 29, 1976.

1
2 MR. LANG: Judge, is there any way we can
3 work this out where we can start on Friday, select
4 the jury, like the Assistant United States Attorney
5 said, and start the testimony on Monday without
6 imposing this fine on Mr. Sutter and having us come
7 in on Friday.

8 THE COURT: I can't try cases on Friday.
9 I have motions, calendars. I have them stacked up.
10 I don't know to what extent on Friday, but you have
11 never been here on Friday. They are eye-openers.

12 MR. LANG: Well, suppose then, Judge, it was
13 a selection of the jury on Thursday and the opening
14 on Thursday and then go over to Monday to the
15 testimony.

16 THE COURT: You would certainly cut Mr.
17 Sutter's fine down to \$3,000.

18 MR. LANG: I am asking for an adjournment
19 to Thursday, Judge.

20 THE COURT: Not now.

21 MR. LANG: We would come in and know there
22 would be --

23 THE COURT: You can cut Mr. Sutter's fine
24 down to \$3,000 in any event. Is there anything else?
25 What are we going to do with the medical?

MR. WILSON: There is a conflict as to the

Hearing, March 29, 1976.

1 necessity for surgery, and I think whoever is going
2 to be representing Mr. Rastelli would like a hearing
3 which probably wouldn't take more than a half a day,
4 unless your Honor feels he can decide on the basis
5 of the written report?

6 THE COURT: I don't see the conflict. Maybe
7 you can point it out to me. I read the reports of
8 Doctor Smith and Doctor Weingard over the weekend,
9 and they seem to be pretty much in agreement.

10 MR. WILSON: There is a small hiatus, your
11 Honor, *which in fact is more serious*
12 *than a large one*

13 THE COURT: Even Doctor Smith says he can't
14 stand trial. He says it is probably not causing Mr.
15 Rastelli's problems as far as the psychological
16 discomfort. That is what he says.

17 MR. WILSON: In one portion, Judge --

18 THE COURT: He doesn't say he can't go to
19 trial. It is nowhere in that statement.

20 MR. WILSON: Perhaps he's able to survive a
21 trial and go through a trial, but I do think from what
22 Doctor Smith said, the fundamental fairness would be
23 such that he should get this surgical treatment
24 before he stands trial. Efforts were certainly made
25 in this regard, Judge.

THE COURT: -- Wilson, that application was

Hearing, March 29, 1976.

1 made last fall, and an adjournment was made to date,
2 to adjourn for you to do that. If the doctor comes
3 in and says that he is not physically able to stand
4 trial, that is one thing.

5 MR. WILSON: But in light of the rather
6 bizarre results ^{of our efforts} ~~that requires him~~ to get surgery
7 that have come about, I ask your Honor to consider
8 this. Mr. Peace's office worked ~~for~~ nearly two
9 months to get a response from Clinton Correctional
10 Facility. That failure, while we have written to
11 the Commissioner of Corrections in the administrative
12 body, we haven't received an answer from them.

13 MR. PEACE: Your Honor, we represent Mr.
14 Rastelli in the case in Suffolk County on which he
15 is now incarcerated. So, dealing with the stated
16 cause, we submit it was our obligation. We got into
17 a Catch-22 situation with the federal court. We
18 couldn't do anything.

19 THE COURT: If Mr. Wilson and Mr. Sutter
20 stayed here and asked me to have him returned to
21 Clinton, I would have done that. I don't follow you.

22 MR. WILSON: May I correct one thing there,
23 Judge. Now we know that all we had to do was ask he
24 be returned. As I stated, he was ~~done~~ ^{here} here. His
25 doctor is here. His family is here. His hospital is

Hearing, March 29, 1976. *Heur*

1 *62*
2 here. We thought it more practical shipping him
3 up there, and shipping him back down, to hold him
4 here while the request was made, which took 2 months
5 for a response. We are trying to do the practical
6 thing, Judge, which obviously --

7 THE COURT: I am not going to grant the
8 request.

9 MR. WILSON: Also, Judge, when your Honor
10 referred me to the cases regarding exhaustion of
11 state remedies, it did fan a little spark of
12 scholarship, and I did read Young *versus* Harris,
13 and all the cases I could find in the advanced
14 sheets, and I really don't find a *holding* ~~standing~~ that the
15 Court lacks jurisdiction, but it seems the Supreme
16 Court lacks jurisdiction, also, and I think --

17 THE COURT: The Supreme Court has jurisdiction.
18 All you have to do is return in the last few months
19 and the surgery could have been done.

20 MR. WILSON: That is a great case for a
21 law exam question, but here we are dealing with a
22 man who needed surgery who still needs surgery.

23 MR. BORNSTEIN: I don't think the issue is
24 simply whether or not Mr. Rastelli was going to get
25 the surgery or whether or not he gets surgery by his
private doctor. The Catch-22 we claim he has simply

1 Hearing, March 29, 1976.
2 been released. The state was prepared to perform
3 surgery. Mr. Rastelli wanted his private physician.
4 There is no assurance that Mr. Rastelli's going to
5 get a furlough from the state.

6 THE COURT: I understand there is. I don't
7 see the basis for it. If Doctor Smith came in here
8 and said, "If you put this man on trial you are
9 going to put his life in jeopardy," I would have
10 held a hearing, but he didn't do that. That is not
11 what his report says, and certainly not what Doctor
12 Weingard's report says.

13 MR. WILSON: I am not claiming that. I am
14 saying he should have had his surgery beforehand
15 and that he failed to get it, I think.

16 THE COURT: I think either or both. I am
17 not prepared to say which, and I'm not going to
18 put you, or Mr. Peace or him on the spot as to whose
19 fault it was, but it was, and being the case there
20 is no basis.

21 MR. WILSON: I don't think there is any need
22 to lay blame out, but in fairness to Mr. Rastelli,
23 he needed surgery, and he didn't get it.

24 THE COURT: Now he has to wait for him to --

25 MR. WILSON: Your Honor may consider the fact
 that the state conviction is very likely to be

recessed
adjoined on the post remedy situation.

THE COURT: I have no idea what is going on in the state case.

MR. WILSON: Would your Honor accept the fact that the defendant is free to be far more effectively defended than one who is incarcerated every day after trial.

THE COURT: Well, we will go ahead on the basis.

MR. WEINTRAUB: Your Honor, I think I would like to address myself to this argument. In the need to prepare for trial, I suspect that Mr. Rastelli's being here in the city since November of last year should have afforded more than ample opportunity to confer with counsel and prepare for trial.

MR. WILSON: Judge, preparation for trial is daily business, and in the evening I don't think even he goes home right after he finishes his day's work and watches television when he is on trial, and neither do defendants and defense counsel in that regard. I think the fact that his being incarcerated or not is significant in his effort to defend himself properly.

THE COURT: You have Mr. Louis Rastelli here.

Hearing, March 29, 1976.

What do you wish to do with respect to him, Mr. Weintraub?

MR. SONENSHINE: Your Honor, while we are waiting might I address myself to the problem. That is, whether I would, in any way, communicate to your chambers physically to know if I have to be here. I am only a few minutes away. It is a walking distance, and I can get here very quickly. I don't just want to find myself staying here doing nothing every morning.

THE COURT: I will leave you in the same situation as Mr. Peace. If things happen without you, that is your problem.

MR. SONENSHINE: Well, I can always be here in a few moments, however.

THE COURT: I am not going to pass upon that as to what can happen.

MR. SONENSHINE: I am aware of that. Mr. Sutter might expect all of us to be here all day long one way or the other.

THE COURT: It is up to you. If nothing happens I am certainly not going to say, "Mr. Sonenshine is not here." If something does happen, and we have to go ahead immediately, you may find yourself in trouble. I am going to call the case

1 Hearing, March 29, 1976.
2 every morning at 9:30 o'clock.

3 MR. SONENSHINE: Well, if it is a matter of
4 just appearing here at 9:30, your Honor, then I have
5 no problem coming here.

6 MR. WILSON: May I be excused. It may have a
7 bearing.

8 MR. LANG: May I ask to be excused?

9 THE COURT: Yes.

10 MR. SONENSHINE: I take it the defendant has
11 to be here because of his physical problem.

12 THE COURT: Do the best you can with the
13 situation. I appreciate the dispute you fellows are
14 in. You are suffering because of what some other
15 people are doing, and I don't think it is proper.

16 MR. SONENSHINE: Are we through the day at
17 this moment as far as my part is concerned?

18 THE COURT: I don't know. Do you want to stay
19 around to see what the result of this phone call is?

20 MR. SONENSHINE: As long as something is
21 happening, fine. I can't step out.

22 MR. BORNSTEIN: Your Honor, there has been
23 pending a motion for severance on behalf of the
24 defendant, Louis Rastelli. Since we last appeared
25 on the matter, I have conferred with Doctor Schmelka,
 the physician who examined Mr. Louis Rastelli on

1 Hearing, March 29, 1976.
2 behalf of the Government. His report is physically
3 in his office and was completed on Friday. I have
4 not had an opportunity to pick it up. I have con-
5 ferred with Doctor Schmelka. I believe the Govern-
6 ment's position was conveyed to Mr. Newman I believe
7 on Friday afternoon after I had conferred with Dr.
8 Schmelka, and I believe Mr. Newman would have a
9 statement at this point.

10 THE COURT: Let me ask you a question before
11 you go further. Have you consulted with the Depart-
12 ment of Justice?

13 MR. BORNSTEIN: Yes.

14 THE COURT: And received authorization?

15 MR. BORNSTEIN: I conferred with David
16 Margolis, the attorney in charge of the Brooklyn
17 Strike Force, and acting deputy chief for the section,
18 as well as Mr. Weintraub, who is in charge of this
19 case, and uniformly agreed that it would be the best
20 interest if the Government values Mr. Rastelli, his
21 physical condition and talked with the Veterans'
22 Administration Hospital, and feels that the case
23 should be severed at this point. Dr. Schmelka had
24 advised that there is no question, it has never been
25 disputed that Mr. Rastelli is paralyzed. It is
 called from the L-1 level down, referred to the ar

Hearing, March 29, 1976.

1 of the lumbar region. I understand from Mr. Schmelka
2 that Mr. Rastelli did not claim in candor to be
3 necessarily in pain for perhaps a two-to-four period.
4 Dr. Schmelka's ultimate recommendation to me on the
5 phone was that he felt anything in excess of two
6 days per week, two 2-hour sessions per day would
7 be physically debilitating to Mr. Rastelli's physical
8 as well as mental condition. In view of that, that
9 would prolong the trial at this point, and the
10 Government will consent to the severance motion by
11 Mr. Newman.

12 MR. NEWMAN: Your Honor, just one thing I
13 wanted to add so that the record is complete. I have
14 been in the case from the initial arraignment.
15 Shortly after the initial arraignment I undertook
16 to represent this defendant and communicated with
17 him before the incident which took place. I would
18 represent to this Court that the person who I
19 communicated to were two different people. I
20 indicated to Mr. Bornstein on a number of occasions.
21 I think to Mr. Weintraub, too. Mainly with Mr.
22 Bornstein.

23 In my communications with him I found that
24 his mind would tend to focus on the immediate
25 problems of pain, and the immediate body functions

1 Hearing, March 29, 1976.
2 which we all take for granted, but which have now
3 been denied him, and this would seem to be his mind
4 wandering from things I would have to focus on or
5 to help me prepare for a defense, and I saw fit to
6 put him on the stand to testify in this case, and
7 a further reason which I think in the interest of
8 justice to mandate what has already been confined.

9 MR. BORNSTEIN: One other fact, your Honor.
10 During the time of the events alleged in the
11 indictment, Mr. Rastelli was not in his present
12 condition. The condition occurred as a result of a
13 gunshot wound he sustained shortly after the indict-
14 ment. The Government believes this is a distinguishing
15 feature. And our position might well have been
16 different had he been paralyzed at the time of the
17 indictment.

18 We might add that the owner of a good deal of
19 consideration on this, one of the problems being the
20 cause of the paralysis, this being a gunshot wound
21 rather than illness, but we feel at the time he was
22 not paraplegic at the time the events took place and
23 to stand trial on a 4-day a week basis which in the
24 Government's position said in his words, "Pushing it."

25 Coupled with the Veteran's Hospital which advised
 he would have to physically lie down on a 4-hour basis,

1 Hearing, March 29, 1976.
2 in the interest of justice, your Honor, we consent
3 to the motion for severance.

4 THE COURT: When did he get this gunshot
5 wound?

6 MR. NEWMAN: March 16th.

7 THE COURT: It was after the arraignment.
8 All right, both sides consenting, this Court will
9 grant the motion to sever at this time with respect
10 to Mr. Louis Rastelli.

11 MR. NEWMAN: Mr. Rastelli, you heard what I
12 said, and is this your understanding too based on
13 the discussion we discussed and based on the dis-
14 cussions we had on the telephone?

15 MR. LOUIS RASTELLI: Right.

16 THE COURT: It is his desire?

17 MR. NEWMAN: Yes.

18 THE COURT: The motion is granted and the
19 case is severed as to him.

20 MR. WEINTRAUB: Thank you, your Honor.

21 MR. NEWMAN: May he be returned to the Veterans'
22 Administration Hospital?

23 The defendant, Rastelli, asks if he can
24 sit down, Judge.

25 THE COURT: Yes. Sure.

 MR. WILSON: I spoke with Mr. Pappa, Judge,

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1 and he spoke with Mr. Sutter who is going to be
2 trying to contact your Honor's chambers, and the
3 gist of it was he would like your Honor to intercede
4 with Judge Semanka.

5 THE COURT: What?

6 MR. WILSON: To intercede with Judge Semanka.
7 To request him at least to allow him to come down
8 here regarding the contempt situation, and/or
9 substitution of counsel or even possibly, should it
10 come about, that Mr. Sutter is to remain in the
11 case for whatever reason, to allow him to have a
12 hiatus in the trial they have in Nassau County, where
13 I believe most of the prosecution's witnesses are
14 police officers.

15 THE COURT: I will wait until I hear from
16 him.

17 MR. WILSON: It is a non-jury case.

18 THE COURT: I understand that. I talked to
19 the judge this morning.

20 Mr. Sutter made a mistake by not telling Judge
21 Semanka that he had an engagement.

22 MR. BORNSTEIN: Upon Mr. Sutter's appearance
23 at the hearing, I would appreciate that the Govern-
24 ment be alerted as to whether or not he comes in.

25 THE COURT: Of course. We will alert all

1 Hearing, March 29, 1976.
2 counsel.

3 MR. LANG: I would like to know about that,
4 too.

5 THE COURT: I don't know. I don't really
6 want to recognize your appearance until you have
7 filed a notice of appearance. I don't want to be
8 charged with anything dealing with your office until
9 you have properly appeared in this case. As I
10 indicated to you at the start of this proceeding,
11 I think it was improper for you to do what you did.
12 To go to the Court of Appeals not as attorneys in
13 this case and make an application. Counsel, you are
14 pressing your luck pretty far. I don't feel that I
15 can do anything with respect to you, because frankly,
16 I don't recognize your existence here in this case.

17 If I had been sitting on the Court of
18 Appeals and you had pulled something like this on me,
19 I think you know what I would have done with you
20 based on what I said. I don't know how to make it
21 clearer to you. I don't think it is proper for an
22 attorney who is not retained to make an application
23 of the type that you made and not tell the Court of
24 Appeals that you are not an attorney of record.

25 MR. LANG: Judge, I am not arguing with you
 about that. I said, "O.K.", the only thing I have

1 asked just at this last moment is when Mr. Sutter
2 comes in can we be notified?

3 THE COURT: I should think that Mr. Sutter
4 would be very happy to notify you. I would think at
5 this point you are in a large part his lifesaver.
6 I don't know how else to make it clear to you.

7 MR. NEWMAN: Would the Court permit Mr. Louis
8 Rastelli's family to visit with him for a minute
9 or two?

10 THE COURT: If it is all right with the
11 marshals, yes.

12 MR. NEWMAN: Is it all right?

13 THE MARSHAL: Yes.

14 THE COURT: Well, I have nothing further until
15 tomorrow morning at 9:30 unless Mr. Sutter can persuade
16 Judge Semanka to let him come over here. I don't
17 know whether to proceed with Mr. Woodfield's case
18 or not.

19 MR. WEINTRAUB: Thank you, your Honor.

20 MR. SLEPPIN: Thank you, your Honor.

21 MR. BORNSTEIN: Thank you, your Honor.

22
23 * * * *
24
25

Pretrial Conference, March 30, 1976.

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

-----X

UNITED STATES OF AMERICA :

- against - : 75 CR 160

PHILIP RASTELLI, :

ANTHONY DE STEFANO, : PRETRIAL

CARL GARY PETROLE, : CONFERENCE

WORKMEN'S MOBILE LUNCH :

ASSOCIATION, :

Defendants. :

-----X

United States Courthouse
Brooklyn, New YorkMarch 30, 1976
10:00 o'clock A.M.

B e f o r e :

HON. THOMAS C. PLATT, U.S.D.J.

These notes are
not to be used
for any purpose
other than the
purpose for which
they were made
therein.

FRANCES S. KARR
OFFICIAL COURT REPORTER*Frances S. Karr*

Pretrial Conference.

2

A p p e a r a n c e s :

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GUSTAVE NEWMAN, Esq.,
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Attorneys for Defendant Rastelli

BY: JOHN J. SUTTER, Esq. and
STEPHEN L. WILLSON, Esq.,
and
JAMES MOFFATT, Esq., appearing for
John J. Sutter, Esq.

MESSRS. SAXE, BACON & BOLAN, P.C.

BY: JOHN F. LANG, Esq.

1
2 MR. WEINTRAUB: Good morning, your Honor.

3 THE COURT: Good morning.

4 I take it you have been advised by Mr. Wilson
5 of what has transpired in the last few days.

6 MR. SUTTER: Yes, I have been apprised of what
7 occurred. I also read the Law Journal this morning
8 and I have the transcript which I have not gotten
9 through yet.

10 THE COURT: Do you wish further time?

11 MR. SUTTER: Yes, I do. I would like to
12 indicate, however, that Judge Samenga most graciously
13 allowed me to come here this morning at my request,
14 which was made yesterday during the trial. I would
15 like to indicate Mr. Moffatt is representing me in
16 this particular matter. He is also my law partner.

17 THE COURT: Why don't you take a few moments
18 and let me know when you are ready.

19 (A recess was taken.)

20 MR. MOFFATT: May it please the Court, my name
21 is James R. Moffatt. I am a partner of Mr. Sutter in
22 the law firm of Sutter, ~~Moffatt~~, Yannelli & Zevin.
23 I have been associated with Mr. Sutter in the prac-
24 tice of law for over sixteen years.

25 We received a communication yesterday, your

Pretrial Conference.

Honor, in fact, several communications and it was our belief or feeling at that time that your Honor had held Mr. Sutter in contempt and had in fact imposed a fine of \$1,000 which is to run daily until Mr. Sutter appeared in this court before your Honor.

I have read the record and I must make specific reference to your Honor to page seven.

I will read into the record where your Honor says:

"Well, Mr. Wilson, if you are going to take that position and Mr. Sutter is not here and you are going to refuse to try the case the alternative would be a fine of \$1,000 a day for Mr. Sutter until he appears.

"Mr. Wilson: Is that without a hearing, Judge?

"The Court: I do not see I have any alternative but if Mr. Sutter wants to come in and be heard, fine. He is not here."

There is a further reference by the Court on page 20 of the record:

"Mr. Lang: That would be no problem. If I may, by the time we really get this going, we could come in the case, Judge, if we could get April 5th.

"The Court: You may have two and a half weeks to make up your mind, for all I know.

Pretrial Conference.

"Mr. Sutter may run up to \$1 000 a day. That is up to you and Mr. Sutter."

As I read that, your Honor has not in fact held Mr. Sutter in contempt. What your Honor required and directed was that Mr. Sutter appear before you. I am here to represent him.

THE COURT: I did not require, I gave him the opportunity.

MR. MOFFATT: Yes, your Honor. I am here to represent him in the event that your Honor does still consider the imposition of a fine and I would respectfully request a hearing in order to hopefully demonstrate to this Court most respectfully that Mr. Sutter did not intentionally or willfully violate a directive or mandate of this Court or any provision of Section 301 Title 18 of the Code.

THE COURT: 401 I believe is the section.

MR. MOFFATT: My basis for that is as follows by way of brief summary:

Mr. Sutter became engaged in a criminal trial in Nassau County on March 8th, after three or four days' preparation. It involves two counts of attempted murder of police officers, which required the imposition of mandatory life sentence if the defendant is found guilty. The jury was waived in the anticipation

Pretrial Conference.

1 that the engagement would take no more than two weeks.
2 Unfortunately, your Honor, it has taken longer than
3 that.

4 The People of the State of New York, represented
5 by Mr. Stephen Irace, Assistant District Attorney who
6 is trying that case, stated in the record yesterday
7 with reference to any recess of the pending Nassau
8 County trial: "I can imagine no other matter that
9 should require his presence, that should require him
10 not to be present in this courtroom and continuing
11 this. I have a claim of actual prejudice which I have
12 made because of these delays having to do with a wit-
13 ness, Detective Craedy, who has a very serious cancer
14 illness and whose appearance and ability to appear in
15 court changes from day to day. Now Detective Craedy
16 is ready to testify tomorrow," that is today, your
17 Honor, "or Wednesday if need be, and I simply cannot
18 sustain the type prejudice that we will have if his
19 testimony does not go as scheduled. There are no
20 circumstances under which the People could consent or
21 in any way agree to a recess of this case for any reason."

22 Judge, I can only say that perhaps Mr. Sutter
23 and myself in his office should have arranged the
24 schedule somehow that would have been available to
25 appear before your Honor and fulfill his commitment

1 representing one of the defendants in the matter be-
2 fore your Honor. However, as I say, the jury trial
3 was waived in Nassau County and it was anticipated
4 by both the People and by the defense and by the
5 judge in that case that it would take no more than
6 two weeks.

7 Mr. Sutter appears here before your Honor with
8 a consent of the presiding judge of Nassau County,
9 Mr. Justice Morrison, presiding judge of the County
10 Court, and Judge Samenga, the judge of the County
11 Court presently presiding at that trial.

12 Judge Semanga recessed that trial this morning.
13 Mr. Sutter is supposed to be back there for trial at
14 two o'clock this afternoon.

15 THE COURT: Specifically, what would you like,
16 counsel? Would you like to present some evidence or
17 how do you propose to handle this?

18 MR. SUTTER: I would be delighted to testify,
19 your Honor.

20 THE COURT: Let your counsel speak for you.

21 MR. MOFFATT: If your Honor wishes to have a
22 hearing I would --

23 THE COURT: You said at one point you would
24 like a hearing and that is why I ask the question.

25 MR. MOFFATT: Your Honor, I do not know. It

Pretrial Conference.

1 was my understanding Mr. Sutter had been held in con-
2 tempt, and as I say, as I read the minutes of yester-
3 day's proceeding, your Honor did not hold Mr. Sutter
4 in contempt if Mr. Sutter would appear before your
5 Honor. That is my understanding of the reading of
6 the minutes of yesterday's proceeding before your
7 Honor. Mr. Sutter is here and, your Honor, would
8 you like him to address the Court?

9 THE COURT: It is up to you. I think you ought
10 to understand my position in this matter. Do you know
11 that this matter was scheduled to go to trial yester-
12 day, March 29, and this was a date picked by all
13 counsel and particularly counsel for the defendants
14 last January 5th, if I am not mistaken, and on that
15 date all counsel, including Mr. Sutter, were given
16 certificates of engagement to appear here.

17 I have yet to see anything that would excuse
18 that failure to appear and failure to be ready.

19 MR. MOFFATT: Judge, I understand that and I
20 can only repeat, it is part of the record of the
21 Nassau County proceedings at in-chambers conference
22 with the Judge that we did not expect this engagement
23 to last this long.

24 THE COURT: Mr. Moffatt, it was not in the
25 discussion with Judge Samenga. If Judge Samenga's

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1 statements to me are correct, there was not even any
2 discussion of this engagement with him at the outset
3 or any other time during the course of that trial.
4 Indeed it came as a complete surprise to Judge
5 Samenga when I called him and mentioned this problem
6 to him yesterday morning.

7 The first application I have from Mr. Sutter
8 for an adjournment on the basis he was otherwise
9 engaged came in Friday afternoon after a full jury
10 panel had been impaneled here and I had repeatedly
11 told counsel, including Mr. Wilson, we were going
12 ahead on March 29th.

13 To make matters even worse I do not suppose I
14 would have even heard about the fact that he was on
15 trial in another case had I not on my own motion
16 some ten days before demanded all counsel appear here
17 because I heard rumors, rumors that there might be
18 some difficulty in getting this case started for trial.

19 MR. MOFFATT: Yes, your Honor, I understand
20 there was a pretrial conference.

21 THE COURT: That was all done on my motion,
22 not on anybody else's motion.

23 MR. MOFFATT: Mr. Sutter's engagement was made
24 known to the Court at that time.

25 THE COURT: But there was no indication at that

Pretrial Conference.

time that were were not going to proceed to trial.

The indications as I read them, even as I read their meaning today, was that you counsel were going to come in and I gave them a condition under which they could come in and proceed to trial. There was no statement that morning that this was completely unacceptable. That came almost a whole week later. Unfortunately I cannot deal with new counsel. They have not appeared in this case.

This Court is left holding the bag with jurors impaneled and sitting and waiting for this trial to commence and with no excuse that I can see for not being prepared to go ahead.

MR. MOFFATT: Well, Judge, we are hopeful that perhaps counsel that have indicated that they would like to be substituted would in fact be substituted. This would avoid the tremendous conflict that we presently face on order from your Honor and possible contempt and an order from Judge Samenga to continue on trial there. Hopefully if in fact that discussion could be effected this would accomplish and serve the ends of justice.

THE COURT: I do not know, I am not going to tell you how to proceed. All I know, as far as I am concerned this case should proceed. The Court of

Pretrial Conference.

1 Appeals has said that he is entitled to new counsel
2 and new counsel is entitled to a continuance or
3 should be entitled to a continuance for a week.
4 However, that does not excuse Mr. Sutter's conduct
5 in the premises as I see it, which is the cause of
6 delay and the cause of disruption to the Court's
7 calendar.

8 This Court explained to others when you were
9 not present.

10 This Court, as the other judges in this district
11 all have heavy calendars and are confronted with the
12 speedy trial rule here.

13 MR. MOFFATT: Judge, we have the problem in
14 Nassau County now of a very important witness by
15 the People, who has a very serious illness.

16 THE COURT: I understand that but, counsel,
17 sympathetic as I may be to your cause and the fact
18 that you find yourself currently on trial, the
19 fact is that no such problem was presented either
20 to Judge Samenga or this Court.

21 MR. MOFFATT: Judge, I was under the under-
22 standing this Court had been advised Mr. Sutter was
23 actually engaged.

24 THE COURT: This Court was first advised on
25 March 19th and that was the date, as I said to you

1 a moment ago when this Court on its own motion, not
2 on the motion of your client or anybody else, demanded
3 that the attorneys appear because it had heard rumors
4 to the effect there might be some difficulty in getting
5 the case started on March 29th. I wish to make it
6 very clear at that time, indeed this whole thing as
7 I see it, would never have been brought to this Court's
8 attention until last Friday if I had not anticipated
9 the fact there might be a problem. I tried to anti-
10 cipate so we would avoid this problem for you and
11 any of the others. But I have had no cooperation
12 from anybody on it.

13 MR. MOFFATT: Judge, to the extent that we have
14 contributed I apologize on behalf of Mr. Sutter and
15 myself, but we have been daily and nightly actively
16 engaged in another matter.

17 THE COURT: If you are going to undertake a
18 murder trial at the beginning of March --

19 MR. SUTTER: Attempted.

20 THE COURT: Attempted murder at the beginning
21 of March --

22 MR. MOFFATT: Nonjury.

23 THE COURT: In my book if you are going to
24 fulfill your professional responsibility you must
25 first inform the Court before whom you are undertaking

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1 such a trial of your engagement in this court and,
2 secondly, you must inform this Court that you are
3 undertaking that engagement. Had that been done,
4 then I am sure, first, Judge Samenga would have been
5 able to work out a modus vivendi. Second, I would
6 not have if I determined Judge Samenga should proceed
7 first and take precedence over this case, I would not
8 have rearranged every other attorney who has been
9 involved before me for the last month, rearranged
10 their schedules and holidays and times to try their
11 cases so as to make room for this particular case.
12 If you had been here over the last month you would
13 understand what I am talking about. I have repeatedly
14 advised the attorneys, including the United States
15 Attorney's office which has been clamoring in certain
16 cases to proceed, that I had made a commitment to
17 Mr. S. ter and other very busy defense attorneys and
18 I was going to keep that commitment.

19 That commitment, I have advised them, might
20 last from a month to three months and I did set aside
21 my calendar for that purpose.

22 I also advised the Chief Judge, when he asked
23 me, because he was not able to get some other judge
24 to take a very important 90-day case, a jail case,
25 and they were about to let the man go through because

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they were running against the 90 days, that I could not take that case for trial because of this case and that I had made such commitment.

Don't you understand what I am talking about when I lay that kind of problem out before you? If you don't, then you do not understand what we are dealing with here.

MR. MOFFATT: Judge, I do. Hindsight, unfortunately, is better than foresight.

THE COURT: It is not hindsight, it is common courtesy, it is common courtesy not only to this Court but all his fellow lawyers at the bar.

MR. MOFFATT: Well, Judge, could I just suggest again the possibility of consideration now by our client here of a possible substitution at this point so it would not interfere unduly, any more unduly, with this Court and also the present engagement that Mr. Sutter is engaged in and in which he is directed to continue in Nassau County.

THE COURT: You can propose any solution you wish.

MR. SUTTER: May I be heard for one moment?

THE COURT: If it is agreeable to your counsel.

MR. SUTTER: May I speak?

MR. MOFFATT: Sure.

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1 MR. SUTTER: If your Honor please, I received
2 a telephone call last evening from Mr. Harold Borg,
3 an attorney from Queens County, who says that he is
4 ready to try a case and was ready yesterday to try
5 a case before your Honor involving perjury. I do
6 not know the defendant's name -- his associate or
7 partner --

8 THE COURT: There are two perjury cases that
9 Mr. Jay has. Mr. Jay has asked for a three-week
10 adjournment because he had gotten sixty hours of tapes.

11 MR. SUTTER: Mr. Borg told me his associate
12 was ready to go in that case.

13 THE COURT: He did not make that representation
14 to the Court.

15 MR. SUTTER: I did not know.

16 Well, I want to tell you something, Judge. I
17 am a trial attorney. I make my livelihood trying
18 cases. A previous counsel walked out on this defendant.
19 We had four days to prepare the case. We worked day
20 and night. I was assured by both Mr. Irace and the
21 Court that the case would take no longer than two
22 weeks because it is a very simple case. It involves
23 whether or not this defendant tried to kill two police
24 officers. The incident was instantaneous. But I
25 find myself in the position where the prosecuting

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attorney has taken over a week to try and get guns in evidence and he cannot still get them in evidence because he does not establish continuity.

I cannot lay down for this man who faces two life sentences -- I don't know how he can serve them but that is what the charge calls for, plus innumerable other counts.

When I took this obligation I was very mindful of my obligation to this Court and I think your Honor knows very, very well that each time anybody was required to be here that Mr. Wilson or somebody else from the firm appeared. I do not intend to be discourteous to the Court. I do not intend to shirk my responsibilities but I have other responsibilities, too.

Mr. Rastelli was advised our our difficulties and he has retained new counsel. They are ready and willing and able to come in on Thursday and all we are asking now at this point is that the matter be adjourned until Thursday. They are busy counsel who are present today here and they ask that they be relieved of the responsibility of coming in tomorrow and that the case commence on Friday. That is all we are asking for.

Judge, I have a tremendous thing out there

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2 in Nassau County on my shoulders. It is not a simple,
3 routine case although we thought it was in the begin-
4 ning. Somebody had to take it over. I was ordered
5 to trial, I was not requested, I was ordered. And
6 I specifically found out how long it would take because
7 I knew I had to be here on the 29th.

8 I have to make a living for my family and I
9 figured I could take the two weeks and come in here
10 on the 29th and I just could not because it did not
11 turn out that way.

12 Your Honor now gives me estimates as to how
13 long this case is going to take. Really, lawyer to
14 lawyer and lawyer to judge, none of us know how long
15 it is going to take, all we can do is estimate. I
16 got my estimate and I gave myself an additional week
17 and it still did not work out.

18 The way it is shaping up now we are going to
19 be there for another two and a half or three weeks
20 because we have not even got to the ballistics people.
21 We have not gotten to our defendant's case. Those
22 are the vagaries that we deal with.

23 I never intended to affront this Court. I
24 never intended to shirk my responsibility. It is
25 an unfortunate situation and I accept the responsibi-
lity and I ask your Honor at this point to adjourn

1 this particular case until Thursday when new counsel
2 will come in. They are here and they are prepared to
3 be substituted and Mr. Rastelli desires that substi-
4 tution, Mr. Philip Rastelli.

5 If you want to fine me \$1,000 a day so be it.
6 I operate at a net loss of \$250 a day right now which
7 my wife is unhappy about, I might add.

8 THE COURT: Well, if it will help, I feel sympa-
9 thetic for your wife.

10 MR. SUTTER: My daughter is not too happy, she
11 wants tuition money.

12 THE COURT: Well, contrary to the report in
13 today's New York Law Journal, this Court has never
14 indicated either yesterday or today that I had any
15 intention of defying the Court of Appeals. Contrary
16 to that report, this Court has never had any intention
17 of defying the Court of Appeals and I have no such
18 intention today. This Court said yesterday that it
19 felt that the responsibility for the failure to commu-
20 nicate was you, Mr. Sutter, and I still have not heard
21 any reason why this Court was not apprised of the
22 appropriate facts and Judge Samenga was not apprised
23 of the appropriate facts until Friday afternoon last
24 week. That to me is not satisfactory.

25 MR. SUTTER: I will be delighted to explain that

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1 if I may, your Honor.

2 Number one, when this Court called counsel on
3 the 19th I had assumed, and I think with some reason-
4 able basis, that Mr. Wilson had advised you I was
5 actually engaged on trial, that the trial was not
6 progressing as rapidly as we thought it was and I
7 would not be available.

8 Further at this point, I knew from speaking
9 with Mr. Wilson and from speaking with Mr. Rastelli
10 on the telephone, that new counsel was stepping in.
11 I knew at that point that there would be some necess-
12 ity for a slight delay. I felt sure in my own mind
13 that you would be advised of the problem. Therefore,
14 I did not communicate because I had a member of my
15 firm here and I assumed he had communicated with you
16 concerning that problem.

17 Judge Samengz was not advised of the engage-
18 ment. We were told it would be a two-week trial and
19 there was no necessity, sir.

20 I might also point out I have to get in touch
21 with Judge Judd if I am going to have to try this
22 case and I do not assume I will, because Mr. Rastelli
23 desires new counsel to represent him, but if I were
24 to be put on here, I have a certificate of engage-
25 ment on the last of the Watergate cases for April 26.

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1 I am sure we have concurrent jurisdiction between
2 the parts of this court.

3 THE COURT: Well, I am not going to tell you
4 how to practice law. Certainly if you were confronted
5 with the trial of this case and you had an engagement
6 before Judge Judd I would apprise him of it forthwith,
7 I would not wait until the boom was lowered.

8 MR. SUTTER: As you have done.

9 THE COURT: As has happened here.

10 MR. SUTTER: Judge, I can assure you after
11 yesterday I am going to write letters all the time.

12 THE COURT: Well, maybe something has been
13 learned.

14 Let me go back to counsel. Is there anything
15 further you wish to put on the record here?

16 MR. MOFFATT: Nothing further other than
17 respectfully request that the Court give consider-
18 ation to adjourning the matter until Thursday so new
19 counsel can be substituted and the trial in Nassau
20 can continue and the matter before this Court can
21 continue.

22 THE COURT: Is a representative from the new
23 firm here?

24 MR. SUTTER: Yes, your Honor.

25 MR. LANG: I am here, your Honor.

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1 THE COURT: When you left yesterday, as I
2 recall, there was a statement that your firm felt it
3 would be prepared to appear on Thursday and select
4 the jury.

5 MR. LANG: I said yesterday that we could come
6 in to the case on Thursday, yes.

7 THE COURT: This is what you felt was adequate
8 time with your preparation?

9 MR. LANG: I do not want to go that far, I did
10 not say that. I said we would come into the case on
11 Thursday and select the jury and go ahead on Monday.

#3 12 THE COURT: Is it inconsistent with your request
13 that you made of the Court of Appeals? The Court has
14 requested me to accord you such time as you need up
15 to April 5th to prepare your case. As I indicated a
16 moment ago, if you were listening, I never made the
17 statement that was attributed to me, and I do not know
18 by whom, in the New York Law Journal this morning,
19 that I was going to defy that request. I have no
20 such intention and the reason I ask you the question
21 consistent with your application to the Court of
22 Appeals, are you going to be prepared on Thursday
23 morning?

24 MR. LANG: Yes, to select the jury and opening
25 statements, your Honor, yes.

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1 THE COURT: So that would be adequate time for
2 you?

3 MR. LANG: Judge, the answer is yes for us to
4 come in Thursday and to start the case.
5

6 THE COURT: Well, I want to make sure that
7 there is no question about it, that there is going to
8 be no claim you have been short-changed on time.

9 MR. LANG: If I could get a month I would be
10 delighted.

11 THE COURT: You did not even apply to the Court
12 for a month, you applied for April 5. My question is,
13 consistent with your application to the Court of
14 Appeals, is Thursday sufficient time?

15 MR. LANG: Again, Judge, as I understand it
16 from what was said here the other day, if we open or
17 we select a jury on Thursday and opened and it would
18 go over until Monday --

19 THE COURT: That is right, I will not be sitting
20 on Friday.

21 MR. LANG: So there is no problem about us coming
22 in on Thursday and selecting a jury and opening and
23 continuing with the trial on Monday.

24 THE COURT: Indeed, on this Friday I said we
25 had motions and hearings, but I have a judicial conference on Friday that I should attend and I propose to

1 attend. That is the reason for my unavailability this
2 Friday.

3 All right, with that being the fact on that
4 aspect of the case, I would still go ahead.

5 MR. WEINTRAUB: Do I take that statement by
6 Mr. Lang, his firm is stating that they will, they
7 feel they have had adequate time to prepare this case
8 to proceed Thursday with the selection of a jury and
9 Monday with evidence?

10 THE COURT: That is my understanding of what
11 he says.

12 MR. WEINTRAUB: I just want to be sure.

13 MR. LANG: What you are doing, if I may say
14 so, your Honor, respectfully, is that everyone seems
15 to be saying we have got adequate time. I will tell
16 you what adequate time would be -- it would be a
17 month in a type of case like this. We asked for a
18 week and we said we would come in with the week.
19 We will go ahead with the trial as your Honor has
20 suggested, and further than that, I am not complain-
21 ing about it. I am saying we are going to do it
22 but you keep asking me if it is adequate. You know
23 that is a relative word, Judge, and frankly I have
24 not been in the case except for a couple of days
25 and there is quite a bit of preparation that has

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1 to be done. But we will come in on Thursday and select
2 a jury and then go ahead with the trial on Monday.
3 I do not see where at this point I can really say any-
4 thing more than that.

5 THE COURT: I think what Mr. Weintraub wants
6 to make sure of is that you are not taking this posi-
7 tion because this Court is in any way or the Government
8 is in any way forcing you to do so.

9 I am not defying the request of the Court of
10 Appeals and it was never my intention to do so. Any-
11 body who was here yesterday would have recognized that
12 fact. If you feel from your firm's standpoint, as I
13 told you right from the start, you do not want to
14 come in here until April 5th and commence, that is
15 your decision to make.

16 Mr. Sutter is counsel of record and he has to
17 take whatever consequences that follow from your
18 decision.

19 MR. LANG: Judge, respectfully again, I say I
20 think I have made the decision for the firm that we
21 will come in on Thursday and do what we have to do.
22 Why press me on that? I do not quite understand that
23 from anyone.

24 MR. WEINTRAUB: Excuse me, your Honor, for
25 interrupting. When Mr. Cohen appeared before this

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1 Court he indicated that with a week's adjournment his
2 firm would be adequately prepared to start the trial.
3 What we are asking is, does it make a difference to
4 the firm that we are going to start and select a jury
5 on Thursday instead of Monday, which would give him
6 a week as they requested? If that makes that much of
7 a difference, I would like to know about it now and
8 not find out on Monday.

9 MR. LANG: It makes no difference. If that is
10 the question, the answer is it makes no difference.

11 MR. SONENSHINE: Your Honor, may I make a
12 request? It is probably the worst moment in the world
13 to make this request but it is probably the only time
14 I will have to do it. I have a matter in the Southern
15 District of Florida, which should take me down there
16 Thursday. It is a matter of one day, that is all I
17 am asking for.

18 THE COURT: No.

19 MR. SONENSHINE: Could we start on Monday?

20 THE COURT: I am shaking my head negatively
21 and I mean it.

22 MR. PEACE: May I be heard, briefly? Might
23 we have a conditional adjournment for Monday if we
24 have a Transit strike Thursday? In that case we will
25 get killed in every way. It took me two hours to

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2 drive from my home this morning and it took me longer
3 than that yesterday. I believe I will just not get
4 here on Thursday.

5 THE COURT: No.

6 MR. SONENSHINE: I can predict something.
7 Knowing my past run of luck in these matters, if we
8 are scheduled for Thursday and I cannot go to Florida,
9 there will be a Transit strike. If we are scheduled
10 for Monday there will not be a Transit strike.

11 MR. PEACE: Look at the good you can do for
12 the citizens of our community, your Honor, right
13 there by putting it off to Monday and saving the
14 citizens a Transit strike.

15 THE COURT: We are proceeding at the moment
16 at the earliest possible time. I think I owe that
17 to Mr. Sutter as well as everybody else involved.
18 We are going to proceed on Thursday if that is when
19 they are prepared to come in.

20 MR. PEACE: Is there a possibility the Court
21 will be closed by a Transit strike, your Honor?

22 THE COURT: No, there is no such possibility.
23 In the last Transit strike, I know the court was
24 open because I was here trying a case before Judge
25 Dooling during almost the entire Transit strike.

MR. SUTTER: No comment, your Honor.

1 MR. WEINTRAUB: There is another matter that
2 should be on the record here and I am somewhat re-
3 luctant, but it has to come out right now. In trial
4 preparation --

5 THE COURT: I did not want to get into details
6 now. I am still dealing with Mr. Sutter, I have not
7 finished with that portion of the hearing.

8 Mr. Moffatt, again, I still have to account
9 for three days with respect to the three-day delay,
10 Monday, Tuesday and Wednesday, you understand that.
11 My question is, do you wish to put anything before
12 the Court respecting that delay?

13 MR. MOFFATT: No, your Honor. I would request
14 leave, if I may, your Honor, to submit a portion of
15 the trial transcript of yesterday's proceedings seek-
16 ing a recess to come here this morning. I would like
17 an opportunity to submit that to the Court, which I
18 will do.

19 THE COURT: You mean the Nassau County trial?

20 MR. MOFFATT: Yes, your Honor.

21 THE COURT: Do you have it available?

22 MR. MOFFATT: Yes, sir. These are the minutes
23 with regard to the recess, your Honor, to appear here.

24 THE COURT: All right, I will take a few
25 minutes' recess and I will read this if you wish me

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to read it at this time and there is nothing further.

MR. MOFFATT: It really adds nothing to what Mr. Sutter has said or I have said. The only additional thing we could do is have Mr. Sutter sworn and take the stand and swear to what he has said.

THE COURT: No, I take Mr. Sutter's representations as an officer of the court, the statements he made as though they were representations made to the Court and I do not think you have to swear an attorney.

MR. SUTTER: May I say one further thing, Judge? Judge Samenga indicated to me when we recessed yesterday if your Honor had any problem as to whether or not I was ordered on that trial on short notice and as to whether or not we indicated that the case would take two weeks -- when I say we I am talking about the prosecutor and the court -- that if your Honor would be gracious enough to call and confirm that --

THE COURT: I believe he confirmed it to me yesterday. That is not the point with which I am concerned. I think I made that clear.

MR. SUTTER: Judge, I understand I am responsible for the action of any of my associates and junior partners. I accept that responsibility. But there has to be some reason and logic when you deal lawyer to lawyer. I assumed this Court was advised

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1 of my engagement and I have reason to believe, if your
2 Honor please, that the "rumor" that your Honor had
3 was implanted by my own firm so that you were apprised,
4 and I think Mr. Wilson is prepared to make a statement
5 as to how your Honor was apprised of the fact that I
6 was engaged on that trial. It came from my firm.
7

8 THE COURT: Even assuming that to be the fact,
9 Mr. Sutter, that is no way to apprise the Court, let
10 it be rumored you may not be available.

11 MR. SUTTER: It was not rumored, Judge, some-
12 body was told about it.

13 THE COURT: Well, I think I have stated my
14 position pretty clearly on the subject. I do not
15 know how I can make it clearer to you.

16 MR. BORNSTEIN: I have to stand up at this
17 point because of what Mr. Sutter said and simply to
18 reply that there was a point, I believe sometime
19 prior to the 19th, that Mr. Wilson did call me.
20 We discussed several topics, amongst which he indicated
21 to me the possibility that Mr. Sutter was actually
22 going to be engaged. I told him I was going to call
23 the Court on the basis of this and I respectfully
24 did want to mention I know I did so. Whether Mr.
25 Wilson took this to mean he was relieved from the
responsibility I do not know, but I did tell him we

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2 were going to be calling for a pretrial conference.
3 There was a subsequent conversation I know as well,
4 where I know with regard to a different matter I
5 suggested Mr. Wilson call the Court directly, but I
6 do know at this point that Mr. Wilson did tell me
7 at least in part about this matter. I told him I
8 would call the Court. I do not know whether he took
9 that as relieving him of the responsibility. I simply
10 wanted to put that on the record.

11 MR. SUTTER: The minutes that have been handed
12 to you, there is nothing in there of any essence other
13 than what I have said and what Mr. Moffatt has stated,
14 and I do not, your Honor, see any necessity for your
15 reviewing it.

16 THE COURT: You handed it to me. I assume
17 you handed it to me for some purpose.

18 MR. SUTTER: Mr. Moffatt did but I do not see
19 the necessity.

20 THE COURT: Do you want me to read it?

21 MR. MOFFATT: I will withdraw the minutes,
22 your Honor.

23 THE COURT: The following is a rough draft of
24 the opinion the Court will put in final form.

25 The Court has heretofore tentatively imposed
a fine of \$1,000 a day on John J. Sutter, Esq.,

1 attorney for the defendant Philip Rastelli, for his
2 failure to appear for the trial of the above-captioned
3 case scheduled to commence on March 29, 1976; such
4 fine to run and accumulate on each day that Mr. Sutter
5 fails to appear and proceed with the trial of the
6 case.

7
8 Mr. Sutter requested and received a hearing on
9 such tentative fine prior to the same being made
10 permanent.

11 The history of this case over the past year is
12 important to an understanding of the action taken by
13 the Court.

14 On March 5, 1975, the indictment herein was
15 filed and ordered sealed by the Court and bench war-
16 rants were issued for the production of the individual
17 defendants. On March 6, 1975, the defendants Philip
18 and Louis Rastelli appeared and were arraigned before
19 this Court, and on March 14, 1975, the defendant
20 Petrole appeared and was arraigned. All of said
21 defendants pled guilty and were released on bail.

22 On March 18, 1975, the Government filed a state-
23 ment of readiness for trial.

24 On March 21, 1975, the case was called for a
25 status report and a Certificate of Engagement for the
trial was issued to John J. Sutter, Esq., for April 4,

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1 1975, at two p.m. On or about April 2, 1975, this
2 Court received copies of telegrams from Mr. Sutter's
3 office indicating that Mr. Rastelli was in the hospital
4 and these formed the basis for an adjournment of the
5 trial to May 9, 1975.

6 On May 9, 1975, the defendant De Stefano
7 appeared, was arraigned, pled not guilty and was
8 released on bail and at the request of the defendants
9 the case was adjourned to September 5, 1975 to set a
10 date for trial. In the interim, on May 23, 1975,
11 a pretrial hearing was held and concluded.

12 On September 5, 1975, the case was called and
13 at the request of the defendants was adjourned to
14 November 10, 1975, when it was adjourned further to
15 November 14, 1975, for trial.

16 On November 14, 1975, the defendants requested
17 a trial date of January 5, 1976 and the Court granted
18 such request on condition that all counsel be prepared
19 to proceed to trial on that date.

20 On December 29, 1975, defendant Philip Rastelli,
21 by his attorney John J. Sutter, Esq., moved for a
22 hearing to determine the said defendant's physical
23 capacity to stand trial. On January 2, 1976, this
24 Court ordered that the defendant Philip Rastelli
25 appear at the office of Dr. Michael Weingarten, 45

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East 72nd Street, New York, New York at nine a.m.

on January 5, 1976 for a physical examination to determine whether he was capable of standing trial. In a report dated January 15, 1976, Dr. Weingarten advised that said defendant was capable of standing trial.

On January 5, 1976, the case was called for trial and the defendant Philip Rastelli's counsel asked for an adjournment to enable to said defendant to undergo elective surgery and requested that said defendant be retained at the Metropolitan Correctional Center for the said purpose prior to the adjourned date for trial. This request was acceded to by the Court. Both sides requested that the case be adjourned for trial to a date subsequent to March 1, 1976, and at the special instance and request of all the defense counsel, Monday, March 29, 1976 was selected as the date on which the case would be tried. Counsel were informed that this was a definite date for trial and were given Certificates of Engagement for that date.

At no time in any of the foregoing pretrial conferences, requests for adjournment, et cetera, did Mr. Sutter or any representative of his office ever advise the Court that he was not ready for trial in that "preparations had been spotty, to say the

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2 least," or otherwise. Quite to the contrary, the
3 requested adjournments by the defendant Rastelli were
4 all predicated upon his medical condition and no in-
5 dication was given to this Court that additional time
6 was desired or needed for preparation by counsel for
7 trial.

8 It should be noted that the Court has been told
9 that the case at bar will take approximately six weeks
10 to try.

11 Unbeknownst to this Court, on or about February
12 28, 1976, Mr. Sutter was retained to try the case of
13 People of the State of New York v. Gregory V. Charmont
14 in the Nassau County Court before Judge Alfred F.
15 Samenga and commenced such trial on March 8, 1976.
16 Mr. Sutter not only did not inform this Court of
17 this engage but more importantly did not advise Judge
18 Samenga of his engagement to try the case at bar on
19 March 29 and did not exhibit to him his Certificate
20 of Engagement signed by this Court for such trial.
21 This Court understands that the Charmont trial (a
22 nonjury case) is still in progress and will be con-
23 tinuing for at least two to three more weeks.

24 In or about the middle of March, rumors to the
25 effect that Mr. Sutter might be "unavailable" to
commence the trial in this case and that his client,

1 Mr. Philip Rastelli, would seek yet another medical
2 adjournment reached the undersigned's chambers and
3 accordingly this Court on its own motion scheduled
4 a further pretrial conference on March 19, 1976, to
5 make sure that counsel understood that no further
6 applications for adjournment would be honored.
7 To and including March 18, no one had advised this
8 Court that there would be any problem in proceeding
9 to trial on March 29, but this Court had advised (1)
10 counsel in innumerable cases that it had made a firm
11 commitment to counsel herein to try this case com-
12 mencing March 29 and that they must adjust their
13 schedules accordingly, and (2) the Chief Judge and
14 other judges in this court that the undersigned could
15 not take other cases requiring an immediate trial
16 because of such commitment. Moreover, this case
17 was at this juncture the oldest case on this Court's
18 criminal calendar and had been pending for some twelve
19 months, six months more than the required maximum
20 prescribed by the Speedy Trial Act of 1974.

21 It is true that all other defendants had waived
22 their rights to a speedy trial (including their rights
23 to move to dismiss (under such Act, the Constitution
24 and the rules and plan of this Circuit and Court)).

25 On March 19, 1976, at two p.m. Stephen Willson,

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1 Esq., an attorney in Mr. Sutter's office, appeared and
2 applied for a 30-day adjournment on the startling
3 grounds that:

4 "Our office and Mr. Sutter who is currently
5 engaged in a murder trial before Judge Samenga in
6 County Court, Nassau County, has not given this case
7 the attention it deserves. I feel, perhaps, I am
8 primarily to blame for not bringing this to Mr.
9 Sutter's attention. Nonetheless, the preparations
10 have been spotty, to say the least. I do not blame
11 Mr. Rastelli for desiring to change counsel, and I
12 hope this Court is not prepared to penalize him for
13 what I feel is my office's neglect."

14 That therefore Mr. Rastelli wished to discharge
15 Mr. Sutter and retain the firm of Saxe, Bacon & Bolan,
16 P.C., and further that Mr. Rastelli was not physically
17 capable of standing trial and that he should be per-
18 mitted to proceed with the elective surgery which
19 had still not been undertaken even though the same
20 had been given as an excuse for not proceeding on
21 January 5.

22 The Court made immediate arrangements for
23 additional medical examinations by the Government
24 physician, Dr. Weingarten, and by the defendant's
25 physician, Dr. Smith, which again proved to be negative

Pretrial Conference.

1 in that they found the defendant capable of standing
2 trial.

3 With respect to the question of substitution
4 of counsel and further delay, the Court held that
5 such substitution would be permitted but only on
6 condition that new counsel were prepared to proceed
7 with the trial ten days hence on the originally
8 schedule date of March 29th.

9 On Friday afternoon, March 26th, this Court
10 received an affidavit from Mr. Sutter stating that
11 he was engaged in the above described trial before
12 Judge Samenga in Nassau County and that such trial
13 "should continue for another two and one half weeks."

14 Mr. Sutter further, in such affidavit, "requested
15 that the trial of the within matter be adjourned for
16 a four-week period to enable your deponent to complete
17 his present engagement on trial and review the pre-
18 paration had on the within cause."

19 He also indicated that the defendant was
20 "seeking a substitution of counsel by the firm of
21 Mike Rosen, Esq., though formal substitution has not
22 yet been had as of this date."

23 Also on Friday, March 26th, this Court was
24 served with a petition for writ of mandamus to the
25 Court of Appeals by the firm of Saxe, Bacon & Bolan,

Pretrial Conference.

1 P.C., seeking a continuance of this matter until
2 April 5, 1976 "in order to enable our firm to come
3 in and represent Mr. Rastelli."

4 In an affidavit annexed to their petition they
5 averred that they are "attorneys for defendant
6 Philip Rastelli." They have not as yet, however,
7 filed a notice of appearance.

8 Parenthetically it should be noted that seven
9 days have by this time elapsed since this Court made
10 it clear that such substitution might be had if such
11 firm was prepared to proceed on March 29th. If they
12 had utilized such week's time instead of making
13 applications for an additional week's time presumably
14 they might have been ready on that date.

15 On Monday morning, March 29th, at approximately
16 9:15 a.m., the undersigned conferred on the telephone
17 with Judge Samenga and was informed that Mr. Sutter
18 had never advised him of his engagement in this court
19 on March 29th, nor had he ever exhibited to him his
20 Certificate of Engagement.

21 On Monday morning this Court was also orally
22 advised that the Court of Appeals for this Circuit
23 had denied the petition for writ of mandamus but had
24 earnestly requested that this Court reconsider the
25 "equities, interests and policies" involved.

Pretrial Conference.

1 In the light of the Court of Appeals' request
2 and in the interests of the defendant, Philip Rastelli,
3 this Court must grant up to a one-week continuance.
4 However, since Mr. Sutter's conduct herein has caused
5 a complete disruption of this Court's calendar, has
6 caused the unnecessary adjournment of other cases
7 both before the undersigned and other judges, has
8 inconvenienced the codefendants and their counsel,
9 and has required the unnecessary conventions of a
10 jury panel for this case, this Court felt and feels
11 that it had and has no alternative but to impose,
12 and continue, a fine for each day of delay of the trial
13 in this case caused by such conduct. Accordingly,
14 the Court imposes a fine of \$500 a day for each day
15 of such delay, namely, Monday, Tuesday and Wednesday
16 of this week.

17 So ordered.

18 MR. SUTTER: Judge, may I have ten days to
19 get a loan and pay the fine?

20 THE COURT: You certainly may.

21 MR. SUTTER: Thank you, sir. Am I formally
22 relieved of the case at this point?

23 THE COURT: I do not believe you are. I
24 predicated it all on Mr. Lang's statement which I
25 assume will be carried forward. I cannot relieve you

1 Pretrial Conference.
2 until you are actually substituted. If Mr. Lang's
3 statements do not prove to be true, Mr. Sutter, of
4 course --

5 MR. SUTTER: I am sure Mr. Lang would not
6 misrepresent to the Court.

7 MR. LANG: I will make a representation to
8 the Court that Saxe, Bacon & Dolan, P.C., will
9 substitute for Mr. Sutter and represent Mr. Philip
10 Pastelli at the trial commencing on Thursday of this
11 week.

12 THE COURT: Very well.

13 MR. SUTTER: May I be excused to return to
14 Nassau?

15 MR. WEINTRAUB: There is one other matter I
16 would like to put on the record before we adjourn
17 this trial.

18 THE COURT: Does Mr. Sutter have to stay?
19 He has asked to be excused.

20 MR. WEINTRAUB: No, sir.

21 THE COURT: You are excused.

22 MR. WEINTRAUB: There is, your Honor, in the
23 indictment in count five, alleging a substantive
24 Hobbs Act charge. The indictment states, in or
25 about the fall of 1971. We anticipate the proof
will be in and about the fall of 1970, your Honor,

Pretrial Conference.

1 and rather than be faced with the variance at trial,
2 which the Government does not think is fatal in any
3 event, we move to amend the indictment to reflect
4 1970 in count five.

5 THE COURT: Mr. Peace, whom do you represent?

6 MR. PEACE: The defendant Petrole, your Honor.

7 THE COURT: Everybody is represented, all
8 right.

9 Well, gentlemen, do I hear any objection?

10 MR. SONENSHINE: I would have to plead surprise.
11 At this moment I do not know whether that is in fact
12 significant or not.

13 THE COURT: Do you want to have a chat with
14 your client?

15 MR. SONENSHINE: For whatever good it might do
16 to try to do it in a hurry.

17 THE COURT: Take your time. The Government
18 wants to know and I want to know, that is what we are
19 here for.

20 MR. SONENSHINE: If I may have a few minutes to
21 find out what significance such change might have.

22 THE COURT: You are still on this case, Mr.
23 Newman?

24 MR. NEWMAN: I have no client to consult with.

25 (A short recess was taken.)

1 MR. SONENSHINE: When I said earlier to your
2 Honor that I would request we start Monday rather
3 than Thursday, that I plan to be in the Southern District
4 of Florida, that was not for any trial. I did not
5 want your Honor to think I might be hooked into any
6 trial.

7 THE COURT: I did not understand it to be as
8 such. You want to go down and attend to a case. I
9 do not know why you cannot call the judge and ask if
10 you can appear on Friday.

11 MR. SONENSHINE: If I go at all it will be
12 for the purpose of having my client testify before a
13 Grand Jury down there.

14 THE COURT: Ask if you can come on Friday.

15 MR. SONENSHINE: With respect to this proposed
16 amendment, I would have to ask your Honor that the
17 United States Attorney make some offer of proof or
18 some statement as to what extent this affects my
19 client, whatsoever, of what evidence he is talking
20 about. If it is evidence that does not affect my
21 client, for which he may have to account in some form,
22 I have no objection. If he is going to offer evidence
23 of a crime committed in an entirely different year,
24 in fact a year later, it may affect my defense here
25 and I do not want that to occur. I represent Mr.

1 De Stefano. Pretrial Conference.

2 MR. PEACE: In behalf of Mr. Petrole, I would
3 have to plead surprise on such notice, your Honor.
4 I have spoken with Mr. Petrole and it will take him
5 some time to go over in his own mind and his records
6 what his connection if any with the names in the
7 indictment. During the original time we have pretty
8 well eliminated that but to have to go back a year
9 again we may have a problem that would be prejudicial
10 to us.

11 MR. LANG: I will join in both of the state-
12 ments made by counsel on behalf of Philip Rastelli,
13 your Honor.

14 THE COURT: I will leave it up to the Govern-
15 ment if at all they wish to reveal anything further
16 at this point. They can assess the risk they run.

17 I will listen to the evidence and if I feel
18 at an appropriate time during the course of the case
19 there is a basis for your objection I will move on it.
20 That is the risk they take. I am not going to delay
21 the trial for that purpose. They can reveal to you
22 as much as they wish at this point and take such risks
23 as they feel they should.

24 MR. WEINTRAUB: May I have a moment, your Honor?

25 The Government has no further comment at all on

Pretrial Conference.
this point, your Honor.

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THE COURT: At the appropriate time I suggest the defense counsel, at the appropriate time when the evidence, if any, is produced with respect to this particular event, I request you point out to me wherein you claim there is surprise and I will consider it.

MR. SONENSHINE: Of course I do not know what the evidence is they are referring to.

THE COURT: Neither do I.

MR. SONENSHINE: I would object at this time, your Honor, to protect the record for my client and I will object to such amendment.

THE COURT: I will allow the amendment subject to the objection at the time to determine whether it is well taken or not, in light of the fact you have been given this warning.

Mr. Lang, is it your understanding that you personally are going to try this case or Mr. Rosen or somebody else?

MR. LANG: Well, on Thursday Mr. Cohen will be trying this case that I know. After that it will be either myself or Mr. Rosen. He is now engaged and I do not know what his schedule will be. But Mr. Cohen will be here on Thursday for the selection

1 Pretrial Conference.
2 of the jury and opening statements and then either
3 Mr. Rosen or myself.

4 MR. SONENSHINE: I have one further request,
5 your Honor, that the United States Attorney apprise
6 the Court and counsel when he first became aware of
7 the error in the indictment that he is referring to,
8 that is the change.

9 THE COURT: I do not think he listened to your
10 request.

11 MR. WEINTRAUB: Excuse me, your Honor.

12 THE COURT: Mr. Sonenshine asked you advise
13 the Court and him when you first became aware of the
14 need to change the indictment from 1971 to 1970.

15 MR. WEINTRAUB: I can state to the Court in
16 reviewing the indictment yesterday as part of my
17 preparation for opening I recalled interviews con-
18 ducted over the last two months which seemed to be
19 at variance, and upon checking those interviews I
20 concluded in my own mind there was a variance.
21 This would have been yesterday afternoon, Mr.
22 Sonenshine.

23 MR. SONENSHINE: Again, when knowledge came
24 to him factually even though he did not act upon it.

25 THE COURT: He said over the last two months.

MR. SONENSHINE: I want to inquire when in

1 Pretrial Conference.
2 the last two months did the interviews apprise you
3 even though the significance escaped you at the moment
4 that the correct year should be the fall of 1972
5 rather than 1971 --

6 MR. NEWMAN: 1970, your Honor, rather than 1971.

7 MR. WEINTRAUB: I really do not see the rele-
8 vance of this, your Honor. First of all, I do not
9 think I can give exact dates at this point. Secondly,
10 I do not think it is relevant.

11 THE COURT: If it appears to become material
12 we can suspend the trial for a few minutes and you can
13 make inquiry out of the presence of the jury.

14 MR. SONENSHINE: Your Honor referred to the
15 fact that your Honor wanted earlier to be alerted.

16 THE COURT: Yes.

17 MR. WEINTRAUB: I would like to withhold the
18 motion to amend, your Honor. I want to make sure
19 first that it is appropriate. It may be legally
20 more appropriate to just allow the variance to come
21 in as a variance. I want to make sure of that.

22 THE COURT: You are advising counsel now that
23 the evidence that you have appears to indicate the
24 fall of 1970 rather than the fall of 1971?

25 MR. WEINTRAUB: Yes, sir, for all purposes I
certainly want them to be aware of that.

Pretrial Conference.

1 MR. SONENSHINE: Your Honor, I would ask rather
2 placing the burden on me since I may not in advance
3 know what is going to occur with respect to a parti-
4 cular piece of testimony --

5 THE COURT: I understand. I will be alert.
6 The prosecutor could certainly advise you at that
7 time that they propose to put in some evidence with
8 respect to this particular transaction. I will try
9 to keep my eyes open and you keep your ears open
10 and between the three of us maybe we can catch it
11 when we are in that state of the proceedings.

12 MR. SONENSHINE: The United States Attorney
13 would be the first to know, he would know in advance
14 what he is going to propound to the witness.

15 THE COURT: It might even come out in the
16 course of your cross-examination.

17 MR. SONENSHINE: That is something else that
18 is true.

19 THE COURT: Anything else, gentlemen?

20 MR. WEINTRAUB: No, your Honor.

21 THE COURT: Why don't we discuss right now
22 while we have some time to consider it, what you
23 gentlemen wish to have me ask the jury, if anything,
24 what peremptory challenges you will be satisfied
25 with and I will be satisfied with and whether Mr.

1 Newman is going to be required to go ahead here at
2 all and other miscellaneous things rather than waste
3 time on Thursday morning.
4

5 The Government has just handed me questions
6 for the jurors. I assume none of you defense counsel
7 have similarly prepared questions for the jury.

8 MR. BORNSTEIN: The proposed voir dire to
9 supplement your Honor's standard questioning --

10 MR. LANG: Judge, I would like to first have
11 time to look at this; since we are just in this case,
12 to submit any questions may I have tomorrow morning,
13 your Honor?

14 THE COURT: Yes, I will give you whatever time
15 you feel is necessary. Just bear in mind if you
16 hand them to me on Thursday morning or even on Wed-
17 nesday late afternoon, since I have an engagement
18 on Wednesday night and I will not be riding the
19 railroad, it might be difficult for me to digest.

20 MR. LANG: I will try to get it to you tomorrow
21 morning, your Honor.

22 MR. SONENSHINE: I have not prepared any internal
23 questions and I do not even know I will have to.

24 THE COURT: You do not have to.

25 MR. SONENSHINE: What I meant is I do not know
that I will have any. If I have they will be rather

Pretrial Conference.

probably simple questions, easily decided by your Honor.

THE COURT: You have heard my standard questions. I do ask the standard questions, whether you have been in trouble with the law, whether you have had any relatives working for the Government in law enforcement.

MR. SONENSHINE: I am concerned as to what connections people have with this type of business involved in this case. I do not think they will be very difficult questions that will be involved.

THE COURT: Do you want to put them in writing?

MR. SONENSHINE: I will try to have them not Wednesday afternoon but Thursday morning. As I say, your Honor can glance at the questions and make a determination, nothing heavy will be involved.

MR. NEWMAN: May I inquire of the Court whether somebody is trying to tell me anything? They do not give me anything.

THE COURT: You have joined the club, be patient.

MR. NEWMAN: I have not got the benefit of their wisdom contained in the requests for voir dire. If they are trying to tell me something maybe they will tell me directly.

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MR. BORNSTEIN: Mr. Weinstein and I have conferred with David Margolies, still chief of the Brooklyn Strike Force as well as Gerald McGuire, acting deputy chief for the region, and upon their oral authorization we renew the motion we made yesterday to sever the Workmen's Mobile Lunch Association, a defendant in this case.

THE COURT: I assume you do not oppose?

MR. NEWMAN: I am thinking about it. It is the first time I will have the pleasure of sitting here and not having a client to answer to and be free to conduct myself as properly or improperly as I saw fit, Judge. It is a luxury I do not often get.

THE COURT: It is up to you, you are in the driver's seat right now.

MR. NEWMAN: May I have a couple of minutes to think about it, Judge? I am going to consult with my client, Judge.

THE COURT: Assuming Mr. Newman does what he thinks he is going to do, what kind of peremptories do you want, gentlemen?

MR. NEWMAN: Reluctantly, Judge, I have no objection.

THE COURT: The Government's motion is granted.

Pretrial Conference.

1
2 MR. NEWMAN: Your Honor, just so that at some
3 future day I do not get bollixed down, could they
4 consider a dismissal against the corporation? I
5 hate to get a call saying the corporation is going
6 on trial, Judge.

7 THE COURT: I assume they have taken the
8 action they have taken advisedly. That is why I
9 gave you the option. If you wish to oppose it, of
10 course, and not run that risk, you may do so.

11 MR. NEWMAN: I will take the calculated risk,
12 Judge.

13 THE COURT: That leaves three defendants, as
14 I see it, leaving six for the Government and ten for
15 the defendants collectively.

16 MR. SONENSHINE: Since we are exercising them
17 jointly, I request your Honor consider particularly
18 in view of the number of counts in the indictment,
19 although they are of a similar nature, whether or not
20 you might grant some additional peremptory challenges.

21 MR. BORNSTEFIN: If so, the Government would
22 ask for a proportional increase.

23 MR. PEACE: I respectfully suggest nine and
24 fifteen, that would be fair to the Government and
25 fair to us.

MR. SONENSHINE: At least it is divisible by

1 Pretrial Conference.
2 three, Judge, if nothing else.

3 THE COURT: I do not know, I have not figured
4 it out mathematically.

5 MR. PEACE: Each is increased by half.

6 THE COURT: If we do that why shouldn't we
7 at six and ten?

8 MR. PEACE: Mr. Sonenshine assumedly would be
9 trying or attempting to expand our peremptory challenges while in no way attempting to delimit the Government. If we expand they are going to expand and
10 in fairness I see nothing wrong with that.

11 THE COURT: Supposing I gave you seven and
12 twelve.

13 MR. PEACE: What you give us we will have to
14 take but requesting is something else and I am requesting fifteen and nine.

15 THE COURT: I am more worried about the extent
16 of our panel. I am told we have a jury panel of 75
17 and that is not an awful lot of leeway. I suppose I
18 can see what we can do to get more. I suspect we
19 will have to get a few extras because it is going to
20 be a rather lengthy trial.

21 MR. BORNSTEIN: If I could suggest perhaps
22 the panel should be enlarged. There are any number
23 of people we had asked to be mentioned in the course
24
25

1 Pretrial Conference.
2 of voir dire.

3 THE COURT: Perhaps we had better wait and see
4 how many jurors we can get.

5 I am told they can assure us of 115 given the
6 present schedule of other judges picking on Thursday.
7 And I am told if there is a Transit strike they are
8 going to fall short.

9 I think in the light of that I will reserve
10 and I will bear in mind the fact that you want nine
11 to fifteen. Depending on the number of available
12 jurors, I will do my best to grant somewhere between
13 six and ten or nine and fifteen.

14 MR. SONENSHINE: What time do we start on
15 Thursday?

16 THE COURT: Ten o'clock.

17 MR. PEACE: Does your Honor intend to try
18 the case four days a week?

19 THE COURT: Four days a week. On Friday you
20 can schedule other matters. If it goes too long I
21 may start trying the case Friday afternoons only.
22 But it is my normal procedure to try a case four
23 days a week and use Friday for motions and hearings
24 and other matters.

25 MR. PEACE: If that is changed we will have
 a day or two notice in any event?

1 THE COURT: Yes.

2 MR. PEACE: Thank you, your Honor.

3 (Whereupon, at 12:15 o'clock A.M., the
4 matter was adjourned to Thursday, April 1, 1976 at
5 ten o'clock A.M.)

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Opinion of United States Court of Appeals
for the Second Circuit.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

(Submitted March 29, 1976

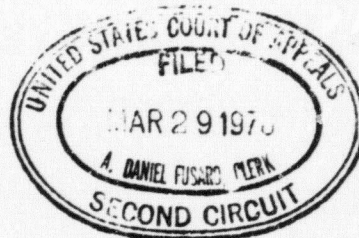
Decided March 29, 1976)

Docket No. 76-3018

Philip Rastelli,
Petitioner,

v.

Hon. Thomas C. Platt, United States
District Judge for the Eastern
District of New York,
Respondent.



Before OAKES and GURFEIN, Circuit Judges, and PIERCE,
District Judge.*

PER CURIAM:

A petition for a writ of mandamus has been filed together with a motion for a stay of a criminal trial scheduled to begin this day before the United States District Court for the Eastern District of New York, Thomas C. Platt, Judge. Petitioner was indicted on or about March 5, 1975, for alleged violations of 18 U.S.C.

* Hon. Lawrence W. Pierce of the United States District Court for the Southern District of New York, sitting by designation.

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Opinion.

24 §§ 1951, 1961, 1962(c) and 15 U.S.C. § 1. A trial date
25 of March 29, 1976, was ultimately set and the petition
26 alleges that on or about March 15, 1976, petitioner
27 advised the firm of Saxe, Bacon & Bolan, P.C., that he
28 wished it to undertake his defense, although to date there
29 has been no official substitution for prior counsel.
1 Applications made on March 19, 1976, and again on
2 March 24, 1976, for a one-week continuance for the
3 purposes of new counsel being enabled to familiarize
4 themselves with the case were denied. The denials
5 occurred despite the fact that the Assistant United States
6 Attorney consented^{to} and joined in the application for a
7 continuance.
8

9
10 Under Stans v. Gagliardi, 485 F.2d 1290 (2d Cir.
11 1973), we do not have the power to hear this matter
12 either as an appeal from an interlocutory order or on
13 the within petition for a writ of mandamus; as we said
14 there, the alternative would result in a deluge of
15 applications to the court of appeals "for the postponement
16 of criminal trials, with consequent delay even though few
17 petitions were to be granted." 485 F.2d at 1292.
18

19
20 At the same time, as in the case of Stans v.
21 Gagliardi, supra, we can see no reason for the failure to
22 grant the simple one week's continuance requested. The
23 Speedy Trial Rules have important and significant purposes,
24 to be sure. But these must be carefully weighed against

25 a defendant's claim of need for a short delay to permit
26 proper preparation, especially where a substitution of
27 counsel in a case involving possible imprisonment for life
28 is concerned. Beyond that here, evidenced strongly by
29 the United States Attorney's consent to the request for
30 a continuance, is the risk to the public that overruling
31 the defendant's claim may, as we said in Stans v.

1 Gagliardi, supra, 485 F.2d at 1291, "undermine a conviction
2 obtained after many weeks of trial."

3 We deny the petition for mandamus under the law of
4 this court as above stated, but we do so with the earnest
5 request to the trial judge that he reconsider the equities,
6 interests and policies underlying his denial of the request
7 for a continuance.
8

9 Petition denied.

Memorandum and Order Appealed From.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

- - - - -x

UNITED STATES OF AMERICA,

75 CR 160

-against-

MEMORANDUM AND
ORDER

PHILIP RASTELLI, et al.,

March 30, 1976

Defendants.

- - - - -x

PLATT, D.J.

The Court has heretofore tentatively imposed a fine of \$1,000 a day on John J. Sutter, Esq., attorney for the defendant Philip Rastelli, for his failure to appear for the trial of the above-captioned case scheduled to commence on March 29, 1976; such fine to run and accumulate on each day that Mr. Sutter failed to appear and proceed with the trial of the case. Mr. Sutter requested and received a hearing on such tentative fine prior to the same being made permanent.

The history of this case over the past year is important to an understanding of the action taken by the Court.

On March 5, 1975, the indictment herein was filed and ordered sealed by the Court and bench warrants were issued for the production of the individual defendants. On March 6, 1975, the defendants Philip and Louis Rastelli appeared and were arraigned before this Court, and on March 14, 1975, the defendant Petrole appeared and was arraigned. All of said defendants pled not guilty and were released on bail.

2.

On March 18, 1975, the government filed a statement of readiness for trial.

On March 21, 1975, the case was called for a status report and a Certificate of Engagement for the trial was issued to John J. Sutter, Esq. for April 4, 1975 at 2PM. On or about April 2, 1975, this Court received copies of telegrams from Mr. Sutter's office indicating that Mr. Rastelli was in the hospital and these formed the basis for an adjournment of the trial to May 9, 1975.

On May 9, 1975, the defendant De Stefano appeared, was arraigned, pled not guilty and was released on bail, and at the request of the defendants the case was adjourned to September 5, 1975 to set a date for trial. In the interim, on May 23, 1975, a pretrial hearing was held and concluded.

On September 5, 1975, the case was called and at the request of the defendants was adjourned to November 10, 1975, when it was adjourned further to November 14, 1975 for trial.

On November 14, 1975, the defendants requested a trial date of January 5, 1976 and the Court granted such request on condition that all counsel be prepared to proceed to trial on that date.

On December 29, 1975, defendant Philip Rastelli, by his attorney John J. Sutter, Esq., moved for a hearing to determine the said defendant's physical capacity to stand trial.

Memorandum and Order Appealed From.

3.

On January 2, 1976 this Court ordered that the defendant Philip Rastelli appear at the office of Dr. Michael Weingarten, 45 East 72nd Street, New York, N.Y. at 9AM on January 5, 1976 for a physical examination to determine whether he was capable of standing trial. In a report dated January 15, 1976, Dr. Weingarten advised that said defendant was capable of standing trial.

On January 5, 1976, the case was called for trial and the defendant Philip Rastelli's counsel asked for an adjournment to enable said defendant to undergo elective surgery and requested that said defendant be retained at the Metropolitan Correctional Center for the said purpose prior to the adjourned date for trial. This request was acceded to by the Court. Both sides requested that the case be adjourned for trial to a date subsequent to March 1, 1976, and at the special instance and request of all the defense counsel, Monday, March 29, 1976 was selected as the date on which the case would be tried. Counsel were informed that this was a definite date for trial and were given Certificates of Engagement for that date.

At no time in any of the foregoing pretrial conferences, requests for adjournments, etc., did Mr. Sutter or any representative of his office ever advise the Court that he was not ready for trial in that "preparations had been spotty, to say the least" or otherwise. Quite to the contrary, the requested adjournments by the defendant Rastelli were all predicated upon his medical condition and no indication was given to this Court that additional time was desired or needed for preparation by counsel for trial.

Memorandum and Order Appealed From.

4.

It should be noted that the Court has been told that the case at bar will take approximately 6 weeks to try.

Unbeknownst to this Court, on or about February 28, 1976, Mr. Sutter was retained to try the case of People of the State of New York v. Gregory V. Charmont in the Nassau County Court before Judge Alfred F. Samenga and commenced such trial on March 8, 1976. Mr. Sutter not only did not inform this Court of this engagement but more importantly did not advise Judge Samenga of his engagement to try the case at bar on March 29 and did not exhibit to him his Certificate of Engagement signed by this Court for such trial. This Court understands that the Charmont trial (a non-jury case) is still in progress and will be continuing for at least two to three more weeks.

In or about the middle of March, rumors to the effect that Mr. Sutter might be "unavailable" to commence the trial in this case and that his client, Mr. Philip Rastelli, would seek yet another medical adjournment reached the undersigned's chambers and accordingly this Court on its own motion scheduled a further pretrial conference on March 19, 1976 to make sure that counsel understood that no further applications for adjournment would be honored. To and including March 18 no one had advised this Court that there would be any problem in proceeding to trial on March 29th but this Court had advised (i) counsel in innumerable cases that it had made a firm commitment to counsel herein to try this case commencing March 29th and that they must adjust their schedules accordingly, and (ii) the Chief Judge and other Judges

Memorandum and Order Appealed From.

5.

in this Court that the undersigned could not take other cases requiring an immediate trial because of such commitment. Moreover, this case was at this juncture the oldest case on this Court's criminal calendar and had been pending for some twelve months, six months more than the required maximum prescribed by the Speedy Trial Act of 1974.*

On March 19, 1976 at 2PM Stephen Willson, Esq., an attorney in Mr. Sutter's office, appeared and applied for a 30-day adjournment on the startling grounds that

"our office and Mr. Sutter, who is currently engaged in a murder trial before Judge Samenga in County Court, Nassau County, has not given this case the attention it deserves. I feel, perhaps, I am primarily to blame for not bringing this to Mr. Sutter's attention. Nonetheless, the preparations have been spotty. to say the least. I do not blame Mr. Rastelli for desiring to change counsel, and I hope this Court is not prepared to penalize him for what I feel is my office's neglect."

that therefore Mr. Rastelli wished to discharge Mr. Sutter and retain the firm of Saxe, Bacon & Bolan, P.C., and further that Mr. Rastelli was not physically capable of standing trial and that he should be permitted to proceed with the elective surgery which had still not been undertaken even though the same had been given as an excuse for not proceeding on January 5th.

* It is true that all of the defendants had waived their rights to a speedy trial (including their rights to move to dismiss) under such Act, the Constitution and the rules and plan of this Circuit and Court.

Memorandum and Order Appealed From.

6.

The Court made immediate arrangements for additional medical examinations by the government physician, Dr. Weingarten, and by the defendant's physician, Dr. Smith, which again proved to be negative in that they found the defendant capable of standing trial. With respect to the question of substitution of counsel and further delay, the Court held that such substitution would be permitted but only on condition that new counsel were prepared to proceed with the trial ten days hence on the originally scheduled date of March 29th.

On Friday afternoon, March 26th, this Court received an affidavit from Mr. Sutter stating that he was engaged in the above-described trial before Judge Samenga in Nassau County and that such trial "should continue for another two and one-half weeks". Mr. Sutter further, in such affidavit, "requested that the trial of the within matter be adjourned for a four week period to enable your deponent to complete his present engagement on trial and review the preparation had on the within cause". He also indicated that the defendant was "seeking a substitution of counsel by the firm of Mike Rosen, Esq., though formal substitution has not yet been had as of this date".

Also on Friday, March 26th, this Court was served with a petition for writ of mandamus to the Court of Appeals by the firm of Saxe, Bacon & Bolan, P.C., seeking a continuance of this matter until April 5, 1976 "in order to enable our firm to come in and represent Mr. Rastelli".*

* In an affidavit annexed to their petition, they averred that they are "attorneys for defendant Philip Rastelli." They have not as yet, however, filed a Notice of Appearance.

Memorandum and Order Appealed From.

7.

Parenthetically it should be noted that seven days had by this time elapsed since this Court made it clear that such substitution might be had if such firm was prepared to proceed on March 29th. If they had utilized such week's time instead of making applications for an additional week's time presumably they might have been ready on that date.

On Monday morning, March 29th, at approximately 9:15AM, the undersigned conferred on the telephone with Judge Samenga and was informed that Mr. Sutter had never advised him of his engagement in this Court on March 29th, nor had he ever exhibited to him his Certificate of Engagement.

On Monday morning this Court was also orally advised that the Court of Appeals for this Circuit had denied the petition for writ of mandamus but had earnestly requested that this Court reconsider the "equities, interests and policies" involved.

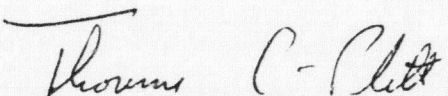
In the light of the Court of Appeals request and in the interests of the defendant, Philip Rastelli, this Court must grant up to a one week continuance. However, since Mr. Sutter's conduct herein has caused a complete disruption of this Court's calendar, has caused the unnecessary adjournment of other cases both before the undersigned and other Judges, has inconvenienced the co-defendants and their counsel, and has required the unnecessary conventions of a jury panel

Memorandum and Order Appealed From.

8.

for this case, this Court feels that it has no alternative but to impose costs for each day of delay of the trial in this case caused by such conduct. Accordingly the Court imposes on Mr. Sutter costs of \$500 a day for each day of delay, i.e., Monday, Tuesday and Wednesday, March 29-31* or a total of \$1500 payable to this Court.

SO ORDERED.



U.S.D.J.

* Messrs. Saxe, Bacon & Bolan, P.C., have represented to the Court that they will be prepared to select a jury in this case on Thursday, April 1, at 10AM.

Notice of Appeal.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

76-1194

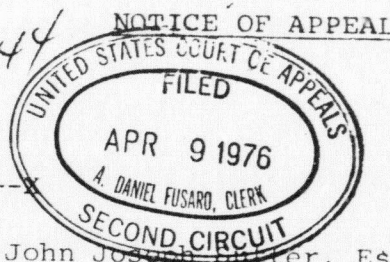
UNITED STATES OF AMERICA,

75 CR 160

- against -

PHILIP RASTELLI, et al.,

Defendants.



Notice is hereby given that John Joseph Sutter, Esq., the former attorney for the defendant above named, hereby appeals to the United States Court of Appeals for the Second Circuit from the memorandum and order imposing "...on Mr. Sutter costs of \$500 a day for each day of delay, i.e., Monday, Tuesday and Wednesday, March 29-31 or a total of \$1500 payable to this Court." entered in this action on the 30th day of March, 1976.

Dated: April 5, 1976
Mineola, New York

James R. Moffatt
JAMES R. MOFFATT OF
SUTTER, MOFFATT, YANNELLI & ZEVIN, P.C.
Attorney for John Joseph Sutter
Office & P.O. Address
33 Willis Avenue
Mineola, New York 11501

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

PHILIP ROSTELLI, et al.,

Defendants,

JOHN JOSEPH SUTTER, Esq.,

Defendant-Appellant.

**AFFIDAVIT
OF SERVICE**

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

STATE OF NEW YORK,
COUNTY OF NEW YORK, ss.:

Rose Rinella, being duly sworn, deposes and says that, he
is over the age of 18 years, is not a party to the action, and resides
at 951 East 17th Street, Brooklyn, New York
That on May 25, 1976, he served 1 copies of Appendix
on

Hon. DAVID TRAGER,
UNITED STATES ATTORNEY FOR THE
EASTERN DISTRICT OF NEW YORK
225 Cadman Plaza East
Brooklyn, New York.

by delivering to and leaving same with a proper person or persons in
charge of the office or offices at the above address or addresses during
the usual business hours of said day.

Sworn to before me this
25th day of May, 1976

John V. D'Esposito
JOHN V. D'ESPOSITO
Notary Public, State of New York
No. 30-0932960
Qualified in Nassau County
Commission Expires March 30, 1977